
United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

OREGON AND CALIFORNIA RAILROAD COM-
PANY, SOUTHERN PACIFIC COMPANY,
STEPHEN T. GAGE, individually and as
trustee, and UNION TRUST COMPANY,
individually and as trustee,

Defendants and Appellants.

vs.

THE UNITED STATES OF AMERICA,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United
States for the District of Oregon from the Decree
entered December 9, 1915.

Filed

MAR 3 - 1916

F. D. Morckton,

Clerk.

No. _____

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*In the United States Circuit Court of Appeals for the
Ninth Circuit.*

OREGON AND CALIFORNIA RAILROAD COM-
PANY, SOUTHERN PACIFIC COMPANY,
STEPHEN T. GAGE, individually and as
trustee, and UNION TRUST COMPANY,
individually and as trustee,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

NAMES AND ADDRESSES OF SOLICITORS
UPON THIS APPEAL:

Wm. F. Herrin,

P. F. Dunne,

San Francisco, California.

Wm. D. Fenton,

Portland, Oregon.

For Appellants Oregon and California Rail-
road Company; Southern Pacific Company
and Stephen T. Gage.

Dolph, Mallory, Simon & Gearin, John M. Gearin,

Portland, Oregon,

Miller, King, Lane & Trafford, and John C. Spooner,
New York.

For Appellant Union Trust Company.

Thomas W. Gregory, Attorney-General,

John W. Davis, Solicitor-General,

Constantine J. Smyth, Special Assistant to the Attor-
ney-General,

Clarence L. Reames, United States District Attorney
for Oregon.

For Appellee.

*In the District Court of the United States for the
District of Oregon, Ninth Circuit.*

No. 3340.

IN EQUITY.

THE UNITED STATES OF AMERICA,

Complainant,

vs.

OREGON AND CALIFORNIA RAILROAD COM-
PANY, SOUTHERN PACIFIC COMPANY,
STEPHEN T. GAGE, individually and as
trustee, and UNION TRUST COMPANY,
individually and as trustee,

Defendants.

United States of America, ss.

To United States of America,

To T. W. Gregory, Attorney General of the United
States,

To Constantine J. Smyth, Special Assistant to the At-
torney General of the United States, and

To Clarence L. Reames, United States Attorney for
the District of Oregon.

GREETING

WHEREAS, Oregon and California Railroad Com-
pany, Southern Pacific Company, Stephen T. Gage,
individually and as trustee, and Union Trust Company
of New York, individually and as trustee, the defend-
ants in the above-entitled suit, have appealed to the

United States Circuit Court of Appeals for the Ninth Circuit, from the judgment and decree made and rendered in the above-entitled Court in the above cause, No. 3340 in Equity, and entered therein on the ninth day of December, A. D., One Thousand Nine Hundred and Fifteen, and from each and every part of said judgment and decree, and the said appeal has been allowed and the security required by law has been given;

You are, therefore, hereby, cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, in the State of California, within thirty days from and after the date of this citation, to show cause, if any there be, why said judgment and decree appealed from should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Charles E. Wolverton, Judge of the United States District Court for the District of Oregon, with the seal of said Court hereunto affixed, this 8th day of January, A. D. 1916.

CHAS. E. WOLVERTON,
United States District Judge.

(SEAL)

Attest:

G. H. Marsh,

Clerk United States District Court, District of
Oregon.

District of Oregon.

County of Multnomah—ss.

Due service of the foregoing citation is hereby ac-

cepted in Multnomah County, Oregon, this 8th day of January, 1916.

JOHN W. DAVIS,
Solicitor-General of the United States.

C. J. SMYTH,
Special Assistant to the Attorney-General.
Attorneys for Complainant.

CLARENCE L. REAMES,
United States Attorney.

Filed January 8, 1916. G. H. Marsh, Clerk.

4 *Oregon and California Railroad Company*

*In the District Court of the United States for the
District of Oregon.*

NOVEMBER TERM, 1915.

BE IT REMEMBERED, That on Wednesday, the 8th day of December, 1915, the same being the 33rd judicial day of the regular November, 1915, term of said Court; Present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had to-wit:

ORDER TO FILE MANDATE. RECORD OF
HEARING ON FORM OF DECREE ON
MANDATE.

*In the District Court of the United States for the
District of Oregon.*

No. 3340. December 8, 1915.

UNITED STATES OF AMERICA,

v.

OREGON AND CALIFORNIA RAILROAD
COMPANY, et al.

Now, at this day, come the plaintiff by Mr. Constantine J. Smyth, Special Assistant to the Attorney-General, and Mr. Clarence L. Reames, United States Attorney, and the defendant Oregon and California Railroad Company by Mr. Peter F. Dunne and Mr. William D. Fenton, of counsel, and Union Trust Company by Mr. John M. Gearin, of counsel, and the intervenors and cross-complainants by Mr. A. W. Lafferty and Mr.

L. C. Garrigus, of counsel; whereupon said plaintiff presents to the Court the mandate of the Supreme Court of the United States in this cause and moves the Court for an order to file said mandate, whereupon IT IS ORDERED that said mandate be filed.

And thereupon this cause comes on to be heard upon the form of decree to be entered herein upon said mandate in accordance with the directions of said mandate and the Court having heard the arguments of counsel will advise thereof.

And afterwards, to wit, on the 8th day of December, 1915, there was duly filed in said Court and cause a Mandate of the Supreme Court of the United States, in words and figures as follows, to wit:

MANDATE OF UNITED STATES SUPREME COURT.

United States of America,—ss.

The President of the United States of America,

To the Honorable the Judges of the District Court of
the United States for the District of Oregon,

(Seal, United States Supreme Court)

Greeting:

WHEREAS, lately in the District Court of the United States, for the District of Oregon, before you, or some of you, in a cause between The United States of America, complainant, and Oregon & California Railroad Company, Southern Pacific Company, Stephen T.

Gage, individually and as trustee, Union Trust Company, individually and as trustee, John L. Snyder, et al., defendants; John L. Snyder, Julius F. Prah, Albert E. Thompson, et al., complainants, and Oregon & California Railroad Company, Union Trust Company, and S. T. Gage, defendants, in cross-complaint, and William F. Slaughter, et al., intervenors, in Equity, No. 3340, wherein the decree of the said District Court entered in said cause on the 1st day of July, A. D. 1913, is in the following words, viz.—

(Here follows copy of said decree of said District Court, as the same is contained in Volume III, pages 1296-1550 of printed transcript of the record on the former appeals taken in this case from said decree of July 1, 1913, and which said transcript of the record is on file in the clerk's office of the Circuit Court of Appeals for the Ninth Circuit, the case being numbered therein 2400, and in the clerk's office of the Supreme Court of the United States, the case in the latter court being numbered 679, October Term, 1914.)

as by the inspection of the transcript of record of the United States Circuit Court of Appeals for the Ninth Circuit, which was brought into the Supreme Court of the United States by virtue of a writ of certiorari agreeably to the act of Congress in such case made and provided, fully and at large appears.

AND WHEREAS, in the present term of October, in the year of our Lord one thousand nine hundred and fourteen, the said cause came on to be heard before the said SUPREME COURT, on the said transcript of record, and was argued by counsel:

ON CONSIDERATION WHEREOF, it is now here ordered, adjudged, and decreed by this Court that the decree of the District Court of the United States for the District of Oregon in this cause be, and the same is hereby, reversed.

AND IT IS FURTHER ORDERED that this cause be, and the same is hereby, remanded to the said District Court for further proceedings in accordance with the opinion of this Court.

June 21, 1915.

You, therefore, are hereby commanded that such further proceedings be had in said cause, in conformity with the opinion and decree of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said writ of certiorari notwithstanding.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 7th day of August in the year of our Lord one thousand nine hundred and fifteen.

JAMES D. MAHER,

Clerk of the Supreme Court of the United States.

Received August 11, 1915. And thereafter from time to time by stipulation of counsel the date when the said mandate would be filed and a decree of the court entered thereon was postponed, and it was further stipulated by counsel that the said proceedings would come on for hearing on the 8th day of December, 1915. Filed December 8, 1915.

G. H. MARSH,

Clerk United States District Court, District of Oregon.

And afterwards, to wit, on Thursday, the 9th day of December, 1915, the same being the 34th judicial day of the regular November, 1915, term of said Court; Present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to wit:

DECREE ON MANDATE OF UNITED
STATES SUPREME COURT.

*In the District Court of the United States for the
District of Oregon.*

No. 3340.

DECREE.

The United States of America,
Complainant,

vs.

Oregon & California Railroad Company,
et al,

Defendants,

John L. Snyder, et al,

Defendants and Cross-Complainants,

William F. Slaughter, et al,

Intervenors.

In pursuance of the mandate of the Supreme Court of the United States filed in this court on the 8th day of December, 1915, in the above entitled cause, counsel for the respective parties being present, it is by the Court ordered, adjudged and decreed as follows:

1. That the decree heretofore entered in said cause so far as it affects the defendants, Oregon & California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, Union Trust Company, individually and as trustee, hereinafter called "the defendants," be, and the same is hereby set aside and held for naught, but is adhered to in all respects as to the defendants and cross-complainants, hereinafter called the "cross-complainants," and the interveners.

2. That the defendants and their respective officers and agents be, and each is hereby, enjoined from selling the lands or any part thereof granted either by the Act of Congress approved July 25, 1866, as amended by the Act of Congress of April 10, 1869, or by the Act of Congress approved May 4, 1870, whether the said lands be situated within the place or indemnity limits of the grants thereby made, to any person not an actual settler on the land sold to him, or in quantities greater than one-quarter section to one purchaser, or for a price exceeding \$2.50 per acre; and from selling any of the timber on said lands, or any mineral or other deposits therein, except as a part of and in conjunction with the land on which the timber stands or in which the mineral or other deposits are found; and from cutting or removing or authorizing the cutting or removal of any of the timber thereon; or from removing or authorizing the removal of mineral or other deposits therein, except in connection with the sale of the land bearing the timber or containing the mineral or other deposits.

3. That the defendants and their respective officers and agents be, and each is hereby, enjoined from making

or agreeing to make, either directly or indirectly, any disposition whatsoever of said lands or of any part thereof, or of the timber thereon or any part thereof, or of any mineral or other deposits therein; from cutting, removing, or authorizing the cutting or removal of the timber thereon or any part thereof; from removing or authorizing the removal of mineral or other deposits therein; and from disposing of, receiving or exerting any control over any money which arose, or may hereafter arise, from said lands, either through sales thereof or of timber thereon, or through condemnation proceedings or otherwise, and now on deposit, or which may hereafter be placed on deposit, with any bank, clerk of court, or other institution or person, to await the final decision of the Supreme Court of the United States in this case, until Congress shall have a reasonable opportunity to make provision by legislation for the disposition of said lands, timber, money, mineral, or other deposits, in accordance with such policy as Congress may deem fitting, under the circumstances, and at the same time secure to the defendants all the value that the said granting acts conferred upon the grantees.

4. That if Congress does not make provision for the disposition as aforesaid of said lands, money, timber, mineral or other deposits, the defendants may apply to the court within a reasonable time, but not less than six months from the entry of this decree, for a modification of so much of the injunction herein ordered as forbids any disposition of the said lands, timber, money, mineral or other deposits, or any part thereof, until Congress shall act, and the court hereby reserves the right to mod-

ify this decree in that regard if, in its opinion, good cause shall then exist for doing so.

5. That this decree shall apply not only to all said grant lands unsold at the time this action was instituted, but also to all such grant lands sold prior to the institution of the action which have since reverted or shall hereafter revert to the defendants or any one of them.

6. That this decree shall be without prejudice to any other suits, rights or remedies which the government may have by law or under the Joint Resolution of Congress passed April 30, 1908, or under the Act of Congress passed August 20, 1912, against the defendants or any of them.

7. That the complainant have and recover from the defendants, Oregon & California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and Union Trust Company, individually and as trustee, and each of them, its lawful costs and disbursements herein, taxed at \$6,249.02, and that execution issue therefor.

Done in open court this 9th day of December, 1915.

BY THE COURT.

Chas. E. Wolverton, Judge.

Filed December 9, 1915. G. H. Marsh, Clerk.

And afterwards, to wit, on the 16th day of December, 1915, there was duly filed in said court and cause, a Cost Bill, in words and figures as follows, to wit:

COST BILL.

Statement of disbursements claimed by the complainant in the above entitled cause, against the defendants Oregon & California Railroad Company, Southern Pacific Company, Stephen T. Gage, and Union Trust Company, viz:

Clerk's fees	\$ 383.75
Marshal's fees	269.47
Attorney's fees	40.00
Depositions of 70 witnesses before special examiner	350.00
Examiner's fees	1,942.50
Witness fees (as appears from the records of the marshal's office and the clerk's office showing payment)	3,263.30
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Total taxed at	\$6,249.02
Taxed by order of January 3, 1916.	

G. H. Marsh, Clerk.

United States of America
District of Oregon—ss.

I, Clarence L. Reames, being duly sworn, on my oath say that I am the United States Attorney for the District of Oregon and one of the attorneys for the complainant in the above entitled cause; that the disbursements set forth herein have been actually and necessarily incurred in the prosecution of this suit; and that the said complainant is entitled to recover the same from the defendants Oregon & California Railroad Company,

Southern Pacific Company, Stephen T. Gage and Union Trust Company, as I verily believe.

CLARENCE L. REAMES.

Subscribed and sworn to before me this 16th day of December, 1915.

G. H. MARSH,

Clerk of the District Court of the United States for the District of Oregon.

United States of America,

State and District of Oregon—ss.

Due service of the within and foregoing statement of costs and disbursements is hereby admitted at Portland, Oregon, this, the 16th day of December, 1915.

WM. D. FENTON,

of Attorneys for the defendants Oregon & California Railroad Company, Southern Pacific Company and Stephen T. Gage.

DOLPH, MALLORY, SIMON & GEARIN,

Attorney for the defendant Union Trust Company.

Filed December 16, 1915. G. H. Marsh, Clerk.

And afterwards, to wit, on Friday, the 17th day of December, 1915, the same being the 41st judicial day of the regular November, 1915, term of said court; Present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to wit:

**ORDER EXTENDING TIME TO FILE
STATEMENT OF THE EVIDENCE.**

Now on this 17th day of December, 1915, upon motion of counsel for Oregon & California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and Union Trust Company, individually and as trustee, defendants above named, for an order of this court extending and enlarging the time for the said defendants and each of them to prepare, serve and file in the office of the clerk of the above entitled court, their and each of their proposed statement of the evidence, or proposed bill of exceptions, statement of, or other record as the said parties may deem advisable, complainant appearing by Clarence L. Reames, United States District Attorney, and the said defendants appearing by Wm. D. Fenton and John M. Gearin; and

It appearing to the court that good cause is shown and exists for said order, and that the said defendants are entitled thereto,

IT IS ORDERED that the time for the said defendants and each of them in the above entitled cause, to prepare, serve and file in said court their and each of their said proposed statement of evidence, or bill of exceptions, or other statement, or record as they may be advised, be and the same is hereby extended and enlarged to and inclusive of January 15, 1916.

CHAS. E. WOLVERTON,

District Judge.

Filed December 17, 1915. G. H. Marsh, Clerk.

And afterwards, to wit, on the 18th day of December, 1915, there was duly filed in said court and cause, objections to cost bill, in words and figures as follows, to wit:

OBJECTIONS TO COST BILL.

Come now the defendants above named, Oregon & California Railroad Company, Southern Pacific Company, Stephen T. Gage and Union Trust Company, and object to so much of the cost bill served and filed herein by the complainant wherein complainant claims \$350.00 for depositions of seventy witnesses before Special Examiner, and moves to strike out said item upon the ground that the same is not a taxable cost or disbursement allowed by law; and on the further ground that all of the testimony taken in said cause was taken and reduced to writing by Miss M. A. Fleming, Special Examiner, and no depositions were taken in said cause; and on the further ground that complainant has charged at the rate of \$5.00 for the alleged depositions of each witness, when, if the same is taxable as a deposition, the legal charge is \$2.50 for each witness.

WM. D. FENTON, P. F. DUNNE, WM. F.
HERRIN AND JNO. M. GEARIN,

Attorneys for said Defendants.

State and District of Oregon—ss.

I, Wm. D. Fenton, being first duly sworn, depose and say that I am Secretary of the Oregon & California Railroad Company, one of the defendants herein, and I am one of the attorneys of the said defendants; that the

objections made and taken above are true as I verily believe.

WM. D. FENTON,

Subscribed and sworn to before me this 18th day of December, 1915.

ALFRED A. HAMPSON,
Notary Public for Oregon.

(SEAL)

My commission expires June 6, 1916.

State of Oregon,

County of Multnomah—ss.

Due service of the within objections is hereby accepted in said County, this 18th day of December, 1915, by receiving a copy thereof, duly certified to as such by Wm. D. Fenton, of attorneys for defendants.

CLARENCE L. REAMES,

U. S. Attorney and Attorney for Complainant.

Filed December 18, 1915. G. H. Marsh, Clerk.

And afterwards, to wit, on Monday, the 27th day of December, 1915, the same being the 49th judicial day of the regular November, 1915, term of said court; Present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to wit:

ORDER STAYING EXECUTION OF
DECREE.

Come now the defendants above named, Oregon & California Railroad Company, Southern Pacific Com-

pany, Stephen T. Gage, individually and as trustee, and Union Trust Company, individually and as trustee, and move the court for a stay of the decree of December 9, 1915, heretofore rendered and entered herein for a period of sixty (60) days from that date, complainant appearing by Clarence L. Reames, United States Attorney, the defendants appearing by Wm. D. Fenton and John M. Gearin,

Whereupon the court being fully advised,

IT IS ORDERED that the execution of said decree be and the same is hereby stayed to and including February 7, 1916, as to costs and disbursements.

CHAS. E. WOLVERTON, Judge.

Filed December 27, 1915. G. H. Marsh, Clerk.

And afterwards, to wit, on Monday, the 3rd day of January, 1916, the same being the 55th judicial day of the regular November, 1915, term of said court; Present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to wit:

ORDER TAXING COSTS.

Heretofore and on the 16th day of December, 1915, the complainant, the United States of America, filed herein its duly verified cost bill claiming costs against the defendants Oregon & California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and Union Trust Company, indi-

vidually and as trustee, in the sum of \$6,249.02 and thereafter and on the 18th day of December, 1915, the defendants, Oregon & California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and the Union Trust Company, individually and as trustee, filed herein their duly verified objections to said cost bill, by which said objections the said defendants objected to the allowance of \$350.00 for the depositions of seventy witnesses:

Thereafter, and on the 27th day of December, 1915, the matter came on regularly to be heard, the objecting defendants being present and represented by William D. Fenton and John M. Gearin of their attorneys, and the complainant being represented by Clarence L. Reames, United States Attorney for the District of Oregon, and the court having sat and heard the statements and arguments of counsel and having taken the matter under advisement to be passed upon at a later date,

Now, the Court being fully advised in the premises, it is ordered and adjudged that said objections be and the same hereby are overruled and the clerk is directed to tax as costs and disbursements against the said defendants, Oregon & California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and the Union Trust Company, individually and as trustee, the following items, to wit:

Clerk's fees	\$ 383.75
Marshal's fees	269.47
Attorney's fees	40.00
Depositions of 70 witnesses before special examiner	350.00
Examiner's fees	1,942.50
Witness fees (as appears from the records of the marshal's office and the clerk's office showing payment)	3,263.30
<hr/>	
Total taxed at	\$6,249.02

Done in open court this the 3rd day of January,
1916.

CHAS. E. WOLVERTON, Judge.

Filed January 3, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on Saturday, the 8th day of January, 1916, the same being the 60th judicial day of the regular November, 1915, term of said court; Present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to wit:

ORDER EXTENDING TIME TO FILE STATEMENT OF THE EVIDENCE.

Now on this 8th day of January, 1916, upon motion of counsel for Oregon & California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, Union Trust Company, individually and as trustee, defendants above named, for an or-

der of this Court extending and enlarging the time of the said defendants, and each of them, to prepare, serve and file their, and each of their, proposed Statement of the Evidence, or proposed Bill of Exceptions, Statement, or other record as the said parties may deem advisable, complainant appearing by Clarence L. Reames, United States District Attorney, and the said defendants appearing by Wm. D. Fenton and John M. Gearin; and it appearing to the Court that good cause is shown and exists for said order, and that the said defendants are entitled thereto,

IT IS ORDERED that the time for the said defendants, and each of them, in the above entitled cause, to prepare, serve and file in said Court, their and each of their said proposed Statement of Evidence, or Bill of Exceptions, Statement, or other record as they may be advised, be and the same is hereby extended and enlarged to and inclusive of January 25, 1916.

CHAS. E. WOLVERTON,
District Judge.

Filed January 8, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on the 8th day of January, 1916, there was issued out of said court a Petition for Appeal, in words and figures, as follows, to wit:

PETITION FOR APPEAL.

*In the District Court of the United States, for the
District of Oregon, Ninth Circuit.*

NO. 3340 IN EQUITY.

United States of America,

Complainant,

vs.

Oregon & California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and Union Trust Company, individually and as trustee,

Defendants.

Oregon & California Railroad Company, Southern Pacific Company, and Stephen T. Gage, individually and as trustee, and Union Trust Company of New York, individually and as trustee, defendants in the above-entitled cause, and each and all of said defendants, conceiving themselves aggrieved by the judgment and decree made and rendered by the above-entitled Court in the above cause, No. 3340 in Equity, and entered therein on the ninth day of December, A. D. one thousand nine hundred and fifteen, in alleged pursuance of the mandate of the Supreme Court of the United States, filed in said Court in said cause on the eighth day of December, A. D. one thousand nine hundred and fifteen, of which said judgment and decree the following is a copy, viz.:

22 *Oregon and California Railroad Company*

*“In the District Court of the United States, for the
District of Oregon.*

United States of America,

Complainant,

vs.

Oregon & California Railroad Company, et al.,

Defendants.

John L. Snyder, et al.,

Defendants and Cross-Complainants.

William F. Slaughter, et al.,

Interveners.

DECREE.

“In pursuance of the mandate of the Supreme Court of the United States filed in this Court on the 8th day of December, 1915, in the above-entitled cause, counsel for the respective parties being present, it is by the Court ordered, adjudged and decreed as follows:

1. That the decree heretofore entered in said cause so far as it affects the defendants, Oregon & California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, Union Trust Company, individually and as trustee, hereinafter called ‘the defendants,’ be, and the same is hereby, set aside and held for naught, but is adhered to in all respects as to the defendants and cross complainants, hereinafter called the ‘cross complainants,’ and the interveners.

2. That the defendants and their respective officers and agents be, and each is hereby, enjoined from selling

the lands or any part thereof granted either by the Act of Congress approved July 25, 1866, as amended by the Act of Congress of April 10, 1869, or by the Act of Congress approved May 4, 1870, whether the said lands be situated within the place or indemnity limits of the grants thereby made, to any person not an actual settler on the land sold to him, or in quantities greater than one-quarter section to one purchaser, or for a price exceeding \$2.50 per acre; and from selling any of the timber on said lands, or any mineral or other deposits therein, except as a part of and in conjunction with the land on which the timber stands or in which the mineral or other deposits are found; and from cutting or removing or authorizing the cutting or removal of any of the timber thereon; or from removing or authorizing the removal of mineral or other deposits therein, except in connection with the sale of the land bearing the timber or containing the mineral or other deposits.

3. That the defendants and their respective officers and agents be, and each is hereby, enjoined from making or agreeing to make, either directly or indirectly, any disposition whatsoever of said lands or of any part thereof, or of the timber thereon or any part thereof, or of any mineral or other deposits therein; from cutting, removing or authorizing the cutting or removal of the timber thereon or any part thereof; from removing or authorizing the removal of mineral or other deposits therein; and from disposing of, receiving or exerting any control over any money which arose, or may hereafter arise, from said lands, either through sales thereof or of timber thereon, or through condemnation proceedings or

otherwise, and now on deposit, or which may hereafter be placed on deposit, with any bank, clerk or court, or other institution or person, to wait the final decision of the Supreme Court of the United States in this case, until Congress shall have a reasonable opportunity to make provision by legislation for the disposition of said lands, timber, money, mineral or other deposits, in accordance with such policy as Congress may deem fitting, under the circumstances, and at the same time secure to the defendants all the value that the said granting acts conferred upon the grantees.

4. That if Congress does not make provision for the disposition as aforesaid of said lands, money, timber, mineral or other deposits, the defendants may apply to the Court within a reasonable time, but not less than six months from the entry of this decree, for a modification of so much of the injunction herein ordered as forbids any disposition of the said lands, timber, money, mineral or other deposits, or any part thereof, until Congress shall act, and the court hereby reserves the right to modify this decree in that regard if, in its opinion, good cause shall then exist for doing so.

5. That this decree shall apply not only to all said grant lands unsold at the time this action was instituted, but also to all such grant lands sold prior to the institution of the action which have since reverted or shall hereafter revert to the defendants or any one of them.

6. That this decree shall be without prejudice to any other suits, rights or remedies which the government may have by law or under the Joint Resolution of Congress

passed April 30, 1908, or under the Act of Congress passed August 20, 1912, against the defendants or any of them.

7. That the complainant have and recover from the defendants, Oregon & California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and Union Trust Company, individually and as trustee, and each of them, its lawful costs and disbursements herein, taxed at \$————, and that execution issue therefor.

Done in open court this 9th day of December, 1915.

BY THE COURT,

(Signed) CHARLES E. WOLVERTON,

Judge.”

Do, and each of them does, hereby jointly and severally appeal from the said judgment and decree and from the whole, and from each and every part thereof, to the United States Circuit Court of Appeals for the Ninth Circuit.

And the said Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as Trustee, and Union Trust Company of New York, individually and as Trustee, the said defendants, and each and all of them, in the above-entitled cause, file herewith their and each of their assignment of errors asserted and intended to be urged upon this their said appeal.

And the said Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, in-

dividually and as Trustee, and Union Trust Company of New York, individually and as trustee, the said defendants, and each and all of them in the above entitled cause, pray that this their petition for said appeal, and that their said appeal may be allowed and that citation issue herein as provided by law, and that a transcript of the record, proceedings and papers upon which said judgment and decree was made and entered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and also that an order be made fixing the amount of security which the said defendants shall give and furnish upon this their said appeal, in order to supersede, suspend and stay Paragraph 7 of said judgment and decree wherein it was adjudged and decreed that complainant have and recover from said four above-named defendants and each of them its lawful costs and disbursements herein and that execution issue therefor, and that upon the giving of such security said paragraph 7 of said judgment and decree, and every part of said paragraph and execution thereon, be superseded, suspended and stayed until the final determination of this cause on appeal.

And your petitioners will ever pray.

WM. F. HERRIN,
P. F. DUNNE and
WM. D. FENTON,

Solicitors and attorneys for said Defendants Oregon and California Railroad Company, Southern Pacific Company, and Stephen T. Gage, individually and as trustee.

MILLER, KING, LANE & TRAFFORD,
DOLPH, MALLORY, SIMON & GEARIN,
JOHN C. SPOONER, JOHN M. GEARIN,

Solicitors and attorneys for said Defendant, Union
Trust Company of New York, individually and as
Trustee.

The foregoing petition for allowance of appeal is
granted and the said appeal is allowed as prayed, upon
the giving of a bond in the sum of FIFTEEN THOU-
SAND DOLLARS (\$15,000.00), to be approved by
this Court, which bond shall, from the date of its ap-
proval, operate as a supersedeas as to paragraph 7 of said
judgment and decree.

Dated this 8th day of January, 1916.

CHAS. E. WOLVERTON,
Judge of said District Court.

District of Oregon,
County of Multnomah,—ss.

Due service of the foregoing petition for appeal is
hereby admitted in Multnomah County, Oregon, this
8th day of January, 1916, by receiving a copy thereof
duly certified to.

JOHN W. DAVIS,
Solicitor General.

C. J. SMYTH,
Special Assistant to Attorney General,
Attorneys for Complainant.

CLARENCE L. REAMES,
United States Attorney.

Filed January 8, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on the 8th day of January, 1916, there was duly filed in said Court and cause, an Assignment of Errors, by defendant, Oregon and California Railroad Company, in words and figures as follows, to wit:

**DEFENDANT OREGON AND CALIFORNIA
RAILROAD COMPANY'S ASSIGNMENT
OF ERRORS.**

The defendant, Oregon and California Railroad Company, complains of errors in the proceedings in this case in the District Court of the United States for the District of Oregon, in the above cause, No. 3340 in Equity, and in the decision, judgment and decree rendered, made and entered therein on the 9th day of December, 1915, under and in alleged pursuance of the mandate of the Supreme Court of the United States theretofore filed in said cause on December 8th, 1915, and assigns the following as the errors complained of:

1. The Court erred in making and entering the said decree of December 9th, 1915.

2. The Court erred in not pursuing the mandate of the Supreme Court of the United States theretofore filed in said cause on December 8th, 1915.

3. The said decree of December 9th, 1915, is not in pursuance of the said mandate, and the Court accordingly erred in making and entering such decree.

4. The Court erred in making and entering the said decree of December 9th, 1915, and each and every paragraph thereof.

5. The Court erred in adjudging and decreeing, as in paragraph 2 of its decree set forth, "that the defendants and their respective officers and agents be, and each is hereby, enjoined from selling the lands or any part thereof granted either by the Act of Congress approved July 25, 1866, as amended by the Act of Congress of April 10, 1869, or by the Act of Congress approved May 4, 1870, whether the said lands be situated within the place or indemnity limits of the grants thereby made, to any person not an actual settler on the land sold to him, or in quantities greater than one-quarter section to one purchaser, or for a price exceeding \$2.50 per acre; and from selling any of the timber on said lands, or any mineral or other deposits therein, except as a part of and in conjunction with the land on which the timber stands or in which the mineral or other deposits are found; and from cutting or removing or authorizing the cutting or removal of any of the timber thereon; or from removing or authorizing the removal of mineral or other deposits therein, except in connection with the sale of the land bearing the timber or containing the mineral or other deposits."

6. The Court erred in adding to the term "actual settler," in said paragraph 2, the qualifying phrase "on the land sold to him."

7. The Court erred in adjudging and decreeing that the defendants and their respective officers and agents be and are by said decree enjoined from selling any of the timber on said lands, except as a part of and in conjunction with the land on which the timber stands; also

from cutting or removing, or authorizing the cutting or removal of any timber thereon, except in connection with the sale of the land bearing the timber; also from selling any mineral or other deposits in said lands, except as a part of and in conjunction with the land in which the mineral or other deposits are found; also from removing or authorizing the removal of mineral or other deposits therein, except in connection with the sale of the land containing the mineral or other deposits.

8. The Court erred in its said decree in incorporating into and making part of the general injunction therein injunctive matter touching the sale of the timber on said lands, except as a part of and in conjunction with the land on which the timber stands; and touching the cutting or removal, or the authorizing of the cutting or removal of any of the timber thereon, except in connection with the sale of the land bearing such timber; likewise touching the sale of any mineral or other deposits in said lands, except as a part of and in conjunction with the land in which the mineral or other deposits are found; and also touching the removing or the authorizing of the removal of mineral or other deposits in said land, except in connection with the sale of the land containing such mineral or other deposits.

9. The Court erred in not holding and decreeing that there was a complete and absolute grant in this case to the railroad company, with power to sell, limited only as prescribed by the Granting Act and Acts.

10. The Court erred in not holding and decreeing that the language of the grants herein and of the limita-

tions upon them is general, and that it was not competent to the said Court to attach exceptions thereto in its decree.

11. The Court erred in not holding and decreeing that the terms of the settlers' proviso or clause in the Granting Act and Acts are prohibitive and not compulsory; and in not holding and decreeing that the observance of such terms would consist in refraining from making sales to other than actual settlers in quantities exceeding 160 acres to any one purchaser, for a price exceeding \$2.50 an acre.

12. The Court erred in not holding that the company, under a complete and absolute grant to it, with power to sell, limited only as prescribed, might choose the actual settler, might sell for any price not exceeding \$2.50 an acre, and might sell in quantities of 40, 60, or 100 acres, or any amount not exceeding 160 acres.

13. The Court erred in not holding and decreeing that there was a complete and absolute grant to the railroad company, with power to sell, limited only as prescribed in the Granting Act and Acts; and erred in not holding and decreeing that there was no obligation imposed upon the railroad company to sell.

14. The Court erred in not holding and decreeing that the Granting Act and Acts did not impose an affirmative obligation on the railroad company to sell the lands, and in not holding and decreeing that the so-called settlers' proviso or clause in the Granting Act and Acts had application only as and when the railroad company made sales of the land.

15. The Court erred in not holding and decreeing that the railroad company, so long as the granted lands were not sold by it but remained unalienated, had a complete and absolute title thereto, and under such circumstances, and as the owner of such a title, had the right to sell, cut, remove, or authorize the cutting or removal of the timber thereon; and the Court erred similarly in not so holding and decreeing with reference to any mineral or other deposits in or products out of said lands—subject to such qualifications as may arise from the limited injunction referable to the period of six months, as expressed in the opinion of the Supreme Court.

16. The Court erred in not holding and decreeing that the language of the so-called settlers' clause or proviso in the Granting Act and Acts is not directive, but restrictive only, and that with this exception, so far as the said timber or mineral deposits or other products are concerned, or any or either of them, the grant of the said lands was unqualified.

17. The Court erred in not holding and decreeing that under the said Granting Act and Acts the railroad company had a discretion of sale and the choice of time and settlers; and further erred in not holding and decreeing that, pending the exercise of such discretion by a sale in accordance with the requirements of the Granting Act and Acts, the said railroad company had a complete and absolute grant of the lands; and was entitled, as of right, to the timber thereon and to the mineral or other deposits therein, and to the products of the soil thereof; and was entitled, as of right, to sell, cut, and remove such timber, or to authorize the cutting or removal of the same,

and to remove, sell or otherwise enjoy mineral or other deposits therein, or any products of the soil thereof—subject to any qualifications arising out of the limited injunction referable to the six months' period above mentioned.

18. The Court erred in not holding and decreeing that the railroad company, so long as it occupied the status of an owner of unalienated lands within the limits of the grant and grants, had all the rights therein of a grantee in fee simple, including the rights of such grantee to the timber thereon or to the mineral or other deposits therein, or to the products of the soil thereof—subject to any qualification as aforesaid, arising out of said limited injunction.

19. The Court erred in not holding and decreeing that the provisions of the so-called settlers' proviso and clause in the Granting Act and Acts were not directive, but restrictive only; and erred in not holding and decreeing that, subject to the restriction, the railroad company took the grant and grants with the right to cut timber thereon, or open and work mines therein, or cultivate the soil thereof, and own, sell, use and enjoy such timber, or the products of such mines, or the cultivation of such soil—subject to any qualification as aforesaid arising out of said limited injunction.

20. The Court erred in not holding and decreeing that timber cut upon the granted lands, while the same remained unalienated in the railroad company, belonged to said railroad company; and likewise as to any minerals extracted therefrom, or any products of the soil culti-

vated thereon—subject to any qualification arising out of said limited injunction, referable to the aforesaid period of six months.

21. The Court erred in not holding and decreeing that the railroad company took the lands in question in fee and was accordingly entitled to make any use thereof not in violation of the restrictive covenants found in the so-called settlers' proviso and clause in the Granting Act and Acts, and not in violation of the limited injunction as aforesaid.

22. The Court erred in making and entering a decree herein in modification and enlargement of the terms of the mandate from the Supreme Court of the United States.

23. The Court erred in not making and entering a decree herein responsive to the mandate of the Supreme Court of the United States, without modification or enlargement, and in the terms of the opinion to which the said mandate referred, and which was expressive of the mandate itself.

24. The Court erred in adjudging and decreeing that the complainant have and recover from the defendants, Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and Union Trust Company, individually and as trustee, and each of them, or from any or either of them, any costs or disbursements herein; and in adjudging and decreeing that execution issue against the said defendants, or any or either of them, for any costs or disbursements herein.

25. The Court erred in not holding and decreeing that no costs or disbursements should be recovered herein from the Oregon and California Railroad Company, or the Southern Pacific Company, or Stephen T. Gage, individually and as trustee, or Union Trust Company, individually and as trustee, or any or either of them.

26. The Court erred in not holding and decreeing that the main contention of the Government, and the one insisted upon in its bill of complaint and at the trial of the cause, was the contention that the so-called settlers' clause and proviso in the Granting Act and Acts was a condition subsequent; and in not holding and decreeing that the said defendants last named, and each and every of them, were justified and acted of right in resisting such contention, both below and on appeal; and in not holding and decreeing that inasmuch as the said defendants had prevailed in resisting such contention, it was not equitable to tax them, or either of them, with costs and disbursements herein in favor of the complainant.

27. The Court erred in not holding and decreeing that it was inequitable to impose costs herein in favor of complainant on the said defendants; and in not holding and decreeing that the case here should be disposed of without adjudging costs in favor either of said defendants or of the complainant, leaving each to bear the costs of his or its own side of the litigation.

28. The Court erred in not making and entering as and for its decree in this cause, and in place and stead of the decree made and entered by it as aforesaid, the decree in the form tendered to it by the said last-named

defendants and each and every of them—that is to say, in not making and entering as its decree in said cause, the following decree:

“In pursuance of the mandate of the Supreme Court of the United States, filed in this Court on the 8th day of December, 1915, in the above-entitled cause, counsel for the respective parties being present, it is by the Court ordered, adjudged and decreed as follows:

1. That the decree heretofore entered in said cause, so far as it affects the defendants, Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, Union Trust Company, individually and as trustee, hereinafter called the ‘defendants’ be, and the same is hereby, set aside and held for naught, but is adhered to in all respects as to the defendants and cross-complainants, hereinafter called the ‘cross-complainants’ and ‘interveners.’

2. That the said defendants and their respective officers and agents be, and each is hereby, enjoined from selling the lands, or any part thereof, granted either by the Act of Congress approved July 25, 1866, as amended by the Act of Congress of April 10, 1869, or by the Act of Congress approved May 4, 1870, whether the said lands be situated within the place or indemnity limits of the grants thereby made to any person not an actual settler, or in quantities greater than one-quarter section to one purchaser, or for a price exceeding two dollars and a half (\$2.50) per acre.

3. That the said defendants and their respective officers and agents be, and each is hereby, enjoined from

any disposition of the said lands or any part thereof, or of the timber thereon, and from cutting or authorizing the cutting or removal of any of the timber thereon, until Congress shall have a reasonable opportunity to provide by legislation for the disposition of said lands in accordance with such policy as it may deem fitting under the circumstances, and at the same time secure to the defendants all the value the granting acts conferred upon the grantees; but if Congress does not make such provision, the defendants may apply to this Court, within a reasonable time, not less than six (6) months from the entry of the decree herein, for a modification of so much of the injunction herein ordered as enjoins any disposition of the lands and timber until Congress shall act."

WHEREFORE, this defendant, Oregon and California Railroad Company, prays that the aforesaid judgment and decree which was made, rendered and entered herein by the above-entitled Court in said cause No. 3340 in Equity, on the 9th day of December, 1915, and that each of said paragraphs of said judgment and decree be reversed, excepting paragraph 1 thereof, wherein it is provided:

"That the decree heretofore entered in said cause, so far as it affects the defendants, Oregon & California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, Union Trust Company, individually and as trustee, hereinafter called 'the defendants,' be, and the same is hereby set aside and held for naught, but is adhered to in all respects as to the defendants and cross complainants, hereinafter called the 'cross complainants,' and the interveners,"

and particularly that paragraph 2 and that paragraph 7 of said judgment and decree be reversed, and for such other relief to this defendant, said Southern Pacific Company, said Stephen T. Gage, individually and as Trustee, and said Union Trust Company, individually and as Trustee, as may be proper.

WM. F. HERRIN,

P. F. DUNNE,

WM. D. FENTON,

Solicitors and Attorneys for said Oregon and California Railroad Company.

Service of the foregoing Assignments of Errors admitted this 8th day of January, 1916.

JOHN W. DAVIS,

Solicitor General of the United States.

C. J. SMYTH,

Special Assistant to the Attorney General.

Solicitors and Attorneys for Appellee.

CLARENCE L. REAMES,

United States Attorney.

Filed January 8, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on the 8th day of January, 1916, there was duly filed in said Court and cause, an Assignment of Errors, by the defendant, the Southern Pacific Company, in words and figures as follows, to wit:

DEFENDANT SOUTHERN PACIFIC COMPANY'S ASSIGNMENT OF ERRORS.

The defendant, Southern Pacific Company, complains of errors in the proceedings in this case in the District Court of the United States for the District of Oregon, in the above cause, No. 3340 in Equity, and in the decision, judgment and decree rendered, made and entered therein on the 9th day of December, 1915, under and in alleged pursuance of the mandate of the Supreme Court of the United States theretofore filed in said cause on December 8th, 1915, and assigns the following as the errors complained of:

1. The Court erred in making and entering the said decree of December 9th, 1915.

2 The Court erred in not pursuing the mandate of the Supreme Court of the United States theretofore filed in said cause on December 8th, 1915.

3. The said decree of December 9th, 1915, is not in pursuance of the said mandate, and the Court accordingly erred in making and entering such decree.

4. The Court erred in making and entering the said decree of December 9th, 1915, and each and every paragraph thereof.

5. The Court erred in adjudging and decreeing, as in paragraph 2 of its decree set forth, "that the defendants and their respective officers and agents be, and each is hereby, enjoined from selling the lands or any part thereof granted either by the Act of Congress approved July 25, 1866, as amended by the Act of Congress of

April 10, 1869, or by the Act of Congress approved May 4, 1870, whether the said lands be situated within the place or indemnity limits of the grants thereby made, to any person not an actual settler on the land sold to him, or in quantities greater than one-quarter section to one purchaser, or for a price exceeding \$2.50 per acre; and from selling any of the timber on said lands, or any mineral or other deposits therein, except as a part of and in conjunction with the land on which the timber stands or in which the mineral or other deposits are found; and from cutting or removing or authorizing the cutting or removal of any of the timber thereon; or from removing or authorizing the removal of mineral or other deposits therein, except in connection with the sale of the land bearing the timber or containing the mineral or other deposits.”

6. The Court erred in adding to the term “actual settler,” in said paragraph 2, the qualifying phrase “on the land sold to him.”

7. The Court erred in adjudging and decreeing that the defendants and their respective officers and agents be and are by said decree enjoined from selling any of the timber on said lands, except as a part of and in conjunction with the land on which the timber stands; also from cutting or removing, or authorizing the cutting or removal of any timber thereon, except in connection with the sale of the land bearing the timber; also from selling any mineral or other deposits in said lands, except as a part of and in conjunction with the land in which the mineral or other deposits are found; also from removing or authorizing the removal of mineral or other deposits

therein, except in connection with the sale of the land containing the mineral or other deposits.

8. The Court erred in its said decree in incorporating into and making part of the general injunction therein injunctive matter touching the sale of the timber on said lands, except as a part of and in conjunction with the land on which the timber stands; and touching the cutting or removal, or the authorizing of the cutting or removal of any of the timber thereon, except in connection with the sale of the land bearing such timber; likewise touching the sale of any mineral or other deposits in said lands, except as a part of and in conjunction with the land in which the mineral or other deposits are found; and also touching the removing or the authorizing of the removal of mineral or other deposits in said land, except in connection with the sale of the land containing such mineral or other deposits.

9. The Court erred in not holding and decreeing that there was a complete and absolute grant in this case to the railroad company, with power to sell, limited only as prescribed by the Granting Act and Acts.

10. The Court erred in not holding and decreeing that the language of the grants herein and of the limitations upon them is general, and that it was not competent to the said Court to attach exceptions thereto in its decree.

11. The Court erred in not holding and decreeing that the terms of the settlers' proviso or clause in the Granting Act and Acts are prohibitive and not compulsory; and in not holding and decreeing that the observ-

ance of such terms would consist in refraining from making sales to other than actual settlers in quantities exceeding 160 acres to any one purchaser, for a price exceeding \$2.50 an acre.

12. The Court erred in not holding that the company, under a complete and absolute grant to it, with power to sell, limited only as prescribed, might choose the actual settler, might sell for any price not exceeding \$2.50 an acre, and might sell in quantities of 40, 60, or 100 acres, or any amount not exceeding 160 acres.

13. The Court erred in not holding and decreeing that there was a complete and absolute grant to the railroad company, with power to sell, limited only as prescribed in the Granting Act and Acts; and erred in not holding and decreeing that there was no obligation imposed upon the railroad company to sell.

14. The Court erred in not holding and decreeing that the Granting Act and Acts did not impose an affirmative obligation on the railroad company to sell the lands, and in not holding and decreeing that the so-called settlers' proviso or clause in the Granting Act and Acts had application only as and when the railroad company made sales of the land.

15. The Court erred in not holding and decreeing that the railroad company, so long as the granted lands were not sold by it but remained unalienated, had a complete and absolute title thereto, and under such circumstances, and as the owner of such a title, had the right to sell, cut, remove, or authorize the cutting or removal of the timber thereon; and the Court erred similarly in not

so holding and decreeing with reference to any mineral or other deposits in or products out of said land—subject to such qualification as may arise from the limited injunction referable to the period of six months, as expressed in the opinion of the Supreme Court.

16. The Court erred in not holding and decreeing that the language of the so-called settler's clause or proviso in the Granting Act and Acts is not directive, but restrictive only, and that with this exception, so far as the said timber or mineral deposits or other products are concerned, or any or either of them, the grant of the said lands was unqualified.

17. The Court erred in not holding and decreeing that under the said Granting Act and Acts the railroad company had a discretion of sale and the choice of time and settlers; and further erred in not holding and decreeing that, pending the exercise of such discretion by a sale in accordance with the requirements of the Granting Act and Acts, the said railroad company had a complete and absolute grant of the lands; and was entitled, as of right, to the timber thereon and to the mineral or other deposits therein, and to the products of the soil thereof; and was entitled, as of right, to sell, cut, and remove such timber, or to authorize the cutting or removal of the same, and to remove, sell or otherwise enjoy mineral or other deposits therein, or any products of the soil thereof—subject to any qualification arising out of the limited injunction referable to the six months' period above mentioned.

18. The Court erred in not holding and decreeing that the railroad company, so long as it occupied the

status of an owner of unalienated lands within the limits of the grant and grants, had all the rights therein of a grantee in fee simple, including the rights of such grantee to the timber thereon or to the mineral or other deposits therein, or to the products of the soil thereof—subject to any qualification as aforesaid, arising out of said limited injunction.

19. The Court erred in not holding and decreeing that the provision of the so-called settlers' proviso and clause in the Granting Act and Acts were not directive, but restrictive only; and erred in not holding and decreeing that, subject to the restriction, the railroad company took the grant and grants with the right to cut timber thereon, or open and work mines therein, or cultivate the soil thereof, and own, sell, use and enjoy such timber, or the products of such mines, or the cultivation of such soil—subject to any qualification as aforesaid arising out of said limited injunction.

20. The Court erred in not holding and decreeing that timber cut upon the granted lands, while the same remained unalienated in the railroad company, belonged to said railroad company; and likewise as to any minerals extracted therefrom, or any products of the soil cultivated thereon—subject to any qualification arising out of said limited injunction, referable to the aforesaid period of six months.

21. The Court erred in not holding and decreeing that the railroad company took the lands in question in fee and was accordingly entitled to make any use thereof not in violation of the restrictive covenants found in the

so-called settlers' proviso and clause in the Granting Act and Acts, and not in violation of the limited injunction as aforesaid.

22. The Court erred in making and entering a decree herein in modification and enlargement of the terms of the mandate from the Supreme Court of the United States.

23. The Court erred in not making and entering a decree herein responsive to the mandate of the Supreme Court of the United States, without modification or enlargement, and in the terms of the opinion to which the said mandate referred, and which was expressive of the mandate itself.

24. The Court erred in adjudging and decreeing that the complainant have and recover from the defendants, Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and Union Trust Company, individually and as trustee, and each of them, or from any or either of them, any costs or disbursements herein; and in adjudging and decreeing that execution issue against the said defendants, or any or either of them, for any costs or disbursements herein.

25. The Court erred in not holding and decreeing that no costs or disbursements should be recovered herein from the Oregon and California Railroad Company, or the Southern Pacific Company, or Stephen T. Gage, individually and as trustee, or Union Trust Company, individually and as trustee, or any or either of them.

26. The Court erred in not holding and decreeing that the main contention of the Government, and the one insisted upon in its bill of complaint and at the trial of the cause, was the contention that the so-called settlers' clause and proviso in the Granting Act and Acts was a condition subsequent; and in not holding and decreeing that the said defendants last named, and each and every of them, were justified and acted of right in resisting such contention, both below and on appeal; and in not holding and decreeing that inasmuch as the said defendants had prevailed in resisting such contention, it was not equitable to tax them, or either of them, with costs and disbursements herein in favor of the complainant.

27. The Court erred in not holding and decreeing that it was inequitable to impose costs herein in favor of complainant on the said defendants; and in not holding and decreeing that the case here should be disposed of without adjudging costs in favor either of said defendants or of the complainant, leaving each to bear the costs of his or its own side of the litigation.

28. The Court erred in not making and entering as and for its decree in this cause, and in place and stead of the decree made and entered by it as aforesaid, the decree in the form tendered to it by the said last-named defendants and each and every of them—that is to say, in not making and entering as its decree in said cause, the following decree:

“In pursuance of the mandate of the Supreme Court of the United States, filed in this Court on the 8th day of December, 1915, in the above-entitled cause, counsel

for the respective parties being present, it is by the Court ordered, adjudged and decreed as follows:

1. That the decree heretofore entered in said cause, so far as it affects the defendants, Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, Union Trust Company, individually and as trustee, hereinafter called the 'defendants' be, and the same is hereby, set aside and held for naught, but is adhered to in all respects as to the defendants and cross-complainants, hereinafter called the 'cross-complainants' and 'interveners.'

2. That said defendants and their respective officers and agents be, and each is hereby, enjoined from selling the lands, or any part thereof, granted either by the Act of Congress approved July 25, 1866, as amended by the Act of Congress of April 10, 1869, or by the Act of Congress approved May 4, 1870, whether the said lands be situated within the place or indemnity limits of the grants thereby made to any person not an actual settler, or in quantities greater than one-quarter section to one purchaser, or for a price exceeding two dollars and a half (\$2.50) per acre.

3. That the said defendants and their respective officers and agents be, and each is hereby, enjoined from any disposition of the said lands or any part thereof, or of the timber thereon, and from cutting or authorizing the cutting or removal of any of the timber thereon, until Congress shall have a reasonable opportunity to provide by legislation for the disposition of said lands in accordance with such policy as it may deem fitting under the

circumstances, and at the same time secure to the defendants all the value the granting acts conferred upon the grantees; but if Congress does not make such provision, the defendants may apply to this Court, within a reasonable time, not less than six (6) months from the entry of the decree herein, for a modification of so much of the injunction herein ordered as enjoins any disposition of the lands and timber until Congress shall act."

WHEREFORE, this defendant, Southern Pacific Company, prays that the aforesaid judgment and decree which was made, rendered and entered herein by the above-entitled Court in said cause No. 3340 in Equity, on the 9th day of December, 1915, and that each of said paragraphs of said judgment and decree be reversed, excepting paragraph 1 thereof, wherein it is provided:

"That the decree heretofore entered in said cause, so far as it affects the defendants, Oregon & California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, Union Trust Company, individually and as trustee, hereinafter called 'the defendants,' be, and the same is hereby set aside and held for naught, but is adhered to in all respects as to the defendants and cross complainants, hereinafter called the 'cross complainants,' and the interveners,"

and particularly that paragraph 2 and that paragraph 7 of said judgment and decree be reversed, and for such other relief to this defendant, said Oregon and California Railroad Company, said Stephen T. Gage, individually

and as trustee, and said Union Trust Company, individually and as Trustee, as may be proper.

WM. F. HERRIN,

P. F. DUNNE,

WM. D. FENTON,

Solicitors and Attorneys for said Southern Pacific Company.

Service of the foregoing Assignments of Errors admitted this 8th day of January, 1916.

JOHN W. DAVIS,

Solicitor General of the United States.

C. J. SMYTH,

Special Assistant to the Attorney General.

Solicitors and Attorneys for Appellee.

CLARENCE L. REAMES,

United States Attorney.

Filed January 8, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on the 8th day of January, 1916, there was duly filed in said Court and cause, an Assignment of Errors by Stephen T. Gage (individually and as trustee), in words and figures as follows, to wit:

DEFENDANT STEPHEN T. GAGE'S (Individually and as Trustee) ASSIGNMENT OF ERRORS.

The defendant, Stephen T. Gage, individually and as trustee, complains of errors in the proceedings in this

case in the District Court of the United States for the District of Oregon, in the above cause, No. 3340 in Equity, and in the decision, judgment and decree rendered, made and entered therein on the 9th day of December, 1915, under and in alleged pursuance of the mandate of the Supreme Court of the United States theretofore filed in said cause on December 8th, 1915, and assigns the following as the errors complained of:

1. The Court erred in making and entering the said decree of December 9th, 1915.

2. The Court erred in not pursuing the mandate of the Supreme Court of the United States theretofore filed in said cause on December 8th, 1915.

3. The said decree of December 9th, 1915, is not in pursuance of the said mandate, and the Court accordingly erred in making and entering such decree.

4. The Court erred in making and entering the said decree of December 9th, 1915, and each and every paragraph thereof.

5. The Court erred in adjudging and decreeing, as in paragraph 2 of its decree set forth, "that the defendants and their respective officers and agents be, and each is hereby enjoined from selling the lands or any part thereof granted either by the Act of Congress approved July 25, 1866, as amended by the Act of Congress of April 10, 1869, or by the Act of Congress approved May 4, 1870, whether the said lands be situated within the place or indemnity limits of the grants thereby made, to any person not an actual settler on the land sold to him,

or in quantities greater than one-quarter section to one purchaser, or for a price exceeding \$2.50 per acre; and from selling any of the timber on said lands, or any mineral or other deposits therein, except as a part of and in conjunction with the land on which the timber stands or in which the mineral or other deposits are found; and from cutting or removing or authorizing the cutting or removal of any of the timber thereon; or from removing or authorizing the removal of mineral or other deposits therein, except in connection with the sale of the land bearing the timber or containing the mineral or other deposits."

6. The Court erred in adding to the term "actual settler," in said paragraph 2, the qualifying phrase "on the land sold to him."

7. The Court erred in adjudging and decreeing that the defendants and their respective officers and agents be and are by said decree enjoined from selling any of the timber on said lands, except as a part of and in conjunction with the land on which the timber stands; also from cutting or removing, or authorizing the cutting or removal of any timber thereon, except in connection with the sale of the land bearing the timber; also from selling any mineral or other deposits in said lands, except as a part of and in conjunction with the land in which the mineral or other deposits are found; also from removing or authorizing the removal of mineral or other deposits therein, except in connection with the sale of the land containing the mineral or other deposits.

8. The Court erred in its said decree in incorporating into and making part of the general injunction

therein injunctive matter touching the sale of the timber on said lands, except as a part of and in conjunction with the land on which the timber stands; and touching the cutting or removal, or the authorizing of the cutting or removal of any of the timber thereon, except in connection with the sale of the land bearing such timber; likewise touching the sale of any mineral or other deposits in said lands, except as a part of and in conjunction with the land in which the mineral or other deposits are found; and also touching the removing or the authorizing of the removal of mineral or other deposits in said land, except in connection with the sale of the land containing such mineral or other deposits.

9. The Court erred in not holding and decreeing that there was a complete and absolute grant in this case to the railroad company, with power to sell, limited only as prescribed by the Granting Act and Acts.

10. The Court erred in not holding and decreeing that the language of the grants herein and of the limitations upon them is general, and that it was not competent to the said Court to attach exceptions thereto in its decree.

11. The Court erred in not holding and decreeing that the terms of the settlers' proviso or clause in the Granting Act and Acts are prohibitive and not compulsory; and in not holding and decreeing that the observance of such terms would consist in refraining from making sales to other than actual settlers in quantities exceeding 160 acres to any one purchaser, for a price exceeding \$2.50 an acre.

12. The Court erred in not holding that the company, under a complete and absolute grant to it, with power to sell, limited only as prescribed, might choose the actual settler, might sell for any price not exceeding \$2.50 an acre, and might sell in quantities of 40, 60 or 100 acres, or any amount not exceeding 160 acres.

13. The Court erred in not holding and decreeing that there was a complete and absolute grant to the railroad company, with power to sell, limited only as prescribed in the Granting Act and Acts; and erred in not holding and decreeing that there was no obligation imposed upon the railroad company to sell.

14. The Court erred in not holding and decreeing that the Granting Act and Acts did not impose an affirmative obligation on the railroad company to sell the lands, and in not holding and decreeing that the so-called settlers' proviso or clause in the Granting Act and Acts had application only as and when the railroad company made sales of the land.

15. The Court erred in not holding and decreeing that the railroad company, so long as the granted lands were not sold by it but remained unalienated, had a complete and absolute title thereto, and under such circumstances, and as the owner of such a title, had the right to sell, cut, remove, or authorize the cutting or removal of the timber thereon; and the Court erred similarly in not so holding and decreeing with reference to any mineral or other deposits in or products out of said land—subject to such qualification as may arise from the limited injunction referable to the period of six months, as expressed in the opinion of the Supreme Court.

16. The Court erred in not holding and decreeing that the language of the so-called settlers' clause or proviso in the Granting Act and Acts is not directive, but restrictive only, and that with this exception, so far as the said timber or mineral deposits or other products are concerned, or any or either of them, the grant of the said lands was unqualified.

17. The Court erred in not holding and decreeing that under the said Granting Act and Acts the railroad company had a discretion of sale and the choice of time and settlers; and further erred in not holding and decreeing that, pending the exercise of such discretion by a sale in accordance with the requirements of the Granting Act and Acts, the said railroad company had a complete and absolute grant of the lands; and was entitled, as of right, to the timber thereon and to the mineral or other deposits therein, and to the products of the soil thereof; and was entitled, as of right, to sell, cut, and remove such timber, or to authorize the cutting or removal of the same, and to remove, sell or otherwise enjoy mineral or other deposits therein, or any products of the soil thereof—subject to any qualification arising out of the limited injunction referable to the six months' period above mentioned.

18. The Court erred in not holding and decreeing that the railroad company, so long as it occupied the status of an owner of unalienated lands within the limits of the grant and grants, had all the rights therein of a grantee in fee simple, including the rights of such grantee to the timber thereon, or to the mineral or other deposits therein, or to the products of the soil thereof—subject

to any qualification as aforesaid, arising out of said limited injunction.

19. The Court erred in not holding and decreeing that the provisions of the so-called settlers' proviso and clause in the Granting Act and Acts were not directive, but restrictive only; and erred in not holding and decreeing that, subject to the restriction, the railroad company took the grant and grants with the right to cut timber thereon, or open and work mines therein, or cultivate the soil thereof, and own, sell, use and enjoy such timber, or the products of such mines, or the cultivation of such soil—subject to any qualification as aforesaid arising out of said limited injunction.

20. The Court erred in not holding and decreeing that timber cut upon the granted lands, while the same remained unalienated in the railroad company, belonged to said railroad company; and likewise as to any minerals extracted therefrom, or any products of the soil cultivated thereon—subject to any qualification arising out of said limited injunction, referable to the aforesaid period of six months.

21. The Court erred in not holding and decreeing that the railroad company took the lands in question in fee and was accordingly entitled to make any use thereof not in violation of the restrictive covenants found in the so-called settlers' proviso and clause in the Granting Act and Acts, and not in violation of the limited injunction as aforesaid.

22. The Court erred in making and entering a decree herein in modification and enlargement of the terms

of the mandate from the Supreme Court of the United States.

23. The Court erred in not making and entering a decree herein responsive to the mandate of the Supreme Court of the United States, without modification or enlargement, and in the terms of the opinion to which the said mandate referred, and which was expressive of the mandate itself.

24. The Court erred in adjudging and decreeing that the complainant have and recover from the defendants, Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and Union Trust Company, individually and as trustee, and each of them, or from any or either of them, any costs or disbursements herein; and in adjudging and decreeing that execution issue against the said defendants, or any or either of them, for any costs or disbursements herein.

25. The Court erred in not holding and decreeing that no costs or disbursements should be recovered herein from the Oregon and California Railroad Company, or the Southern Pacific Company, or Stephen T. Gage, individually and as trustee, or Union Trust Company, individually and as trustee, or any or either of them.

26. The Court erred in not holding and decreeing that the main contention of the Government, and the one insisted upon in its bill of complaint and at the trial of the cause, was the contention that the so-called settlers' clause and proviso in the Granting Act and Acts was a condition subsequent; and in not holding and decreeing

that the said defendants last named, and each and every of them, were justified and acted of right in resisting such contention, both below and on appeal; and in not holding and decreeing that inasmuch as the said defendants had prevailed in resisting such contention, it was not equitable to tax them, or either of them, with costs and disbursements herein in favor of the complainant.

27. The Court erred in not holding and decreeing that it was inequitable to impose costs herein in favor of complainant on the said defendants; and in not holding and decreeing that the case here should be disposed of without adjudging costs in favor either of said defendants or of the complainant, leaving each to bear the costs of his or its own side of the litigation.

28. The Court erred in not making and entering as and for its decree in this cause, and in place and stead of the decree made and entered by it as aforesaid, the decree in the form tendered to it by the said last-named defendants and each and every of them—that is to say, in not making and entering as its decree in said cause, the following decree:

“In pursuance of the mandate of the Supreme Court of the United States, filed in this Court on the 8th day of December, 1915, in the above-entitled cause, counsel for the respective parties being present, it is by the Court ordered, adjudged and decreed as follows:

1. That the decree heretofore entered in said cause, so far as it affects the defendants, Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, Union Trust

Company, individually and as trustee, hereinafter called the 'defendants' be, and the same is hereby, set aside and held for naught, but is adhered to in all respects as to the defendants and cross-complainants, hereinafter called the 'cross-complainants' and 'interveners.'

2. That the said defendants and their respective officers and agents be, and each is hereby, enjoined from selling the lands, or any part thereof, granted either by the Act of Congress approved July 25, 1866, as amended by the Act of Congress of April 10, 1869, or by the Act of Congress approved May 4, 1870, whether the said lands be situated within the place or indemnity limits of the grants thereby made to any person not an actual settler, or in quantities greater than one-quarter section to one purchaser, or for a price exceeding two dollars and a half (\$2.50) per acre.

3. That the said defendants and their respective officers and agents be, and each is hereby, enjoined from any disposition of the said lands or any part thereof, or of the timber thereon, and from cutting or authorizing the cutting or removal of any of the timber thereon, until Congress shall have a reasonable opportunity to provide by legislation for the disposition of said lands in accordance with such policy as it may deem fitting under the circumstances, and at the same time secure to the defendants all the value the granting acts conferred upon the grantees; but if Congress does not make such provision, the defendants may apply to this Court, within a reasonable time, not less than six (6) months from the entry of the decree herein, for a modification of so much of the

injunction herein ordered as enjoins any disposition of the lands and timber until Congress shall act."

WHEREFORE, this defendant, Stephen T. Gage, individually and as trustee, prays that the aforesaid judgment and decree which was made, rendered and entered herein by the above-entitled Court in said cause No. 3340 in Equity, on the 9th day of December, 1915, and that each of said paragraphs of said judgment and decree be reversed, excepting paragraph 1 thereof, wherein it is provided:

"That the decree heretofore entered in said cause, so far as it affects the defendants, Oregon & California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, Union Trust Company, individually and as trustee, hereinafter called 'the defendants,' be, and the same is hereby set aside and held for naught, but is adhered to in all respects as to the defendants and cross complainants, hereinafter called the 'cross complainants,' and the interveners,"

and particularly that paragraph 2 and that paragraph 7 of said judgment and decree be reversed, and for such other relief to this defendant, said Oregon and California Railroad Company, said Southern Pacific Company, and said Union Trust Company, individually and as Trustee, as may be proper.

WM. F. HERRIN,
P. F. DUNNE,
WM. D. FENTON,

Solicitors and Attorneys for said Stephen T. Gage, individually and as Trustee.

Service of the foregoing Assignments of Errors admitted this 8th day of January, 1916.

JOHN W. DAVIS,
Solicitor General of the United States.

C. J. SMYTH,
Special Assistant to the Attorney General,
Solicitors and Attorneys for Appellee.

CLARENCE L. REAMES,
United States Attorney.

Filed Jan. 8, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on the 8th day of January, 1916, there was duly filed in said Court, and cause, an Assignment of Errors by the Union Trust Company (individually and as trustee), in words and figures as follows, to wit:

**DEFENDANT UNION TRUST COMPANY'S
(Individually and as Trustee) ASSIGNMENT
OF ERRORS.**

The defendant, Union Trust Company, individually and as trustee, complains of errors in the proceedings in this case in the District Court of the United States for the District of Oregon, in the above cause, No. 3340 in Equity, and in the decision, judgment and decree rendered, made and entered therein on the 9th day of December, 1915, under and in alleged pursuance of the mandate of the Supreme Court of the United States theretofore filed in said cause on December 8th, 1915, and assigns the following as the errors complained of:

1. The Court erred in making and entering the said decree of December 9th, 1915.

2. The Court erred in not pursuing the mandate of the Supreme Court of the United States theretofore filed in said cause on December 8th, 1915.

3. The said decree of December 9th, 1915, is not in pursuance of the said mandate, and the Court accordingly erred in making and entering such decree.

4. The Court erred in making and entering the said decree of December 9th, 1915, and each and every paragraph thereof.

5. The Court erred in adjudging and decreeing, as in paragraph 2 of its decree set forth, "that the defendants and their respective officers and agents be, and each is hereby, enjoined from selling the lands or any part thereof granted either by the Act of Congress approved July 25, 1866, as amended by the Act of Congress of April 10, 1869, or by the Act of Congress approved May 4, 1870, whether the said lands be situated within the place or indemnity limits of the grants thereby made, to any person not an actual settler on the land sold to him, or in quantities greater than one-quarter section to one purchaser, or for a price exceeding \$2.50 per acre; and from selling any of the timber on said lands, or any mineral or other deposits therein, except as a part of and in conjunction with the land on which the timber stands or in which the mineral or other deposits are found; and from cutting or removing or authorizing the cutting or removal of any of the timber thereon; or from removing

or authorizing the removal of mineral or other deposits therein, except in connection with the sale of the land bearing the timber or containing the mineral or other deposits.”

6. The Court erred in adding to the term “actual settler,” in said paragraph 2, the qualifying phrase “on the land sold to him.”

7. The Court erred in adjudging and decreeing that the defendants and their respective officers and agents be and are by said decree enjoined from selling any of the timber on said lands, except as a part of and in conjunction with the land on which the timber stands; also from cutting or removing, or authorizing the cutting or removal, of any timber thereon, except in connection with the sale of the land bearing the timber; also from selling any mineral or any other deposits in said lands, except as a part of and in conjunction with the land in which the mineral or other deposits are found; also from removing or authorizing the removal of mineral or other deposits therein, except in connection with the sale of the land containing the mineral or other deposits.

8. The Court erred in its said decree in incorporating into and making part of the general injunction therein injunctive matter touching the sale of the timber on said lands, except as a part of and in conjunction with the land on which the timber stands; and touching the cutting or removal, or the authorizing of the cutting or removal, of any of the timber thereon, except in connection with the sale of the land bearing such timber; likewise touching the sale of any mineral or other deposits in

said lands, except as part of and in conjunction with the land in which the mineral or other deposits are found; and also touching the removal or the authorizing of the removal of mineral or other deposits in said land, except in connection with the sale of the land containing such mineral or other deposits.

9. The Court erred in not holding and decreeing that there was a complete and absolute grant in this case to the railroad company, with power to sell, limited only as prescribed by the Granting Act and Acts.

10. The Court erred in not holding and decreeing that the language of the grants herein and of the limitations upon them is general, and that it was not competent to the said Court to attach exceptions thereto in its decree.

11. The Court erred in not holding and decreeing that the terms of the Settlers Proviso or clause in the Granting Act and Acts are prohibitive and not compulsory; and in not holding and decreeing that the observance of such terms would consist in refraining from making sales to other than actual settlers in quantities exceeding 160 acres to any one purchaser, for a price exceeding \$2.50 an acre.

12. The Court erred in not holding that the company, under a complete and absolute grant to it, with power to sell, limited only as prescribed, might choose the actual settler, might sell for any price not exceeding \$2.50 an acre, and might sell in quantities of 40, 60, or 100 acres, or any amount not exceeding 160 acres.

13. The Court erred in not holding and decreeing that there was a complete and absolute grant to the railroad company, with power to sell, limited only as prescribed in the Granting Act and Acts; and erred in not holding and decreeing that there was no obligation imposed upon the railroad company to sell.

14. The Court erred in not holding and decreeing that the Granting Act and Acts did not impose an affirmative obligation on the railroad company to sell the lands, and in not holding and decreeing that the so-called Settlers Proviso or clause in the Granting Act and Acts had application only as and when the railroad company made sales of the land.

15. The Court erred in not holding and decreeing that the railroad company, so long as the granted lands were not sold by it but remained unalienated, had a complete and absolute title thereto, and under such circumstances, and as the owner of such a title, had the right to sell, cut, remove, or authorize the cutting or removal of the timber thereon; and the Court erred similarly in not so holding and decreeing with reference to any mineral or other deposits in or products out of said lands—subject to such qualification as may arise from the limited injunction referable to the period of six months, as expressed in the opinion of the Supreme Court.

16. The Court erred in not holding and decreeing that the language of the so-called Settlers Clause or proviso in the Granting Act and Acts is not directive, but restrictive only, and that with this exception, so far as the said timber or mineral deposits or other products

are concerned, or any or either of them, the grant of the said lands were unqualified.

17. The Court erred in not holding and decreeing that under the said Granting Act and Acts the railroad company had a discretion of sale and the choice of time and settlers; and further erred in not holding and decreeing that, pending the exercise of such discretion by a sale in accordance with the requirements of the Granting Act and Acts, the said railroad company had a complete and absolute grant of the lands; and was entitled as of right, to the timber thereon and to the mineral or other deposits therein, and to the products of the soil thereof; and was entitled, as of right, to sell, cut and remove such timber, or to authorize the cutting or removal of the same, and to remove, sell or otherwise enjoy mineral or other deposits therein, or any products of the soil thereof—subject to any qualification arising out of the limited injunction referable to the six months' period above mentioned.

18. The Court erred in not holding and decreeing that the railroad company, so long as it occupied the status of an owner of unalienated lands within the limits of the grant and grants, had all the rights therein of a grantee in fee simple, including the rights of such grantee to the timber thereon, or to the mineral or other deposits therein, or to the products of the soil thereof—subject to any qualification as aforesaid, arising out of said limited injunction.

19. The Court erred in not holding and decreeing that the provisions of the so-called Settlers Proviso and

clause in the Granting Act and Acts were not directive, but restrictive only; and erred in not holding and decreeing that, subject to the restriction, the railroad company took the grant and grants with the right to cut timber thereon, or open and work mines therein, or cultivate the soil thereof, and own, sell, use and enjoy such timber, or the products of such mines, or the cultivation of such soil—subject to any qualification as aforesaid arising out of said limited injunction.

20. The Court erred in not holding and decreeing that timber cut upon the granted lands, while the same remained unalienated in the railroad company, belonged to said railroad company; and likewise as to any minerals extracted therefrom, or any products of the soil cultivated thereon—subject to any qualification arising out of said limited injunction, referable to the aforesaid period of six months.

21. The Court erred in not holding and decreeing that the railroad company took the lands in question in fee and was accordingly entitled to make any use thereof not in violation of the restrictive covenants found in the so-called Settlers Proviso and clause in the Granting Act and Acts, and not in violation of the limited injunction as aforesaid.

22. The Court erred in making and entering a decree herein in modification and enlargement of the terms of the mandate from the Supreme Court of the United States.

23. The Court erred in not making and entering a decree herein responsive to the mandate of the Supreme

Court of the United States, without modification or enlargement, and in the terms of the opinion to which the said mandate referred, and which was expressive of the mandate itself.

24. The Court erred in adjudging and decreeing that the complainant have and recover from the defendants, Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and Union Trust Company, individually and as trustee, and each of them, or from any or either of them, any costs or disbursements herein, and in adjudging and decreeing that execution issue against the said defendants or any or either of them, for any costs or disbursements herein.

25. The Court erred in not holding and decreeing that no costs or disbursements should be recovered herein from the Oregon and California Railroad Company, or the Southern Pacific Company, or Stephen T. Gage, individually and as trustee, or Union Trust Company, individually and as trustee, or any or either of them.

26. The Court erred in not holding and decreeing that the main contention of the Government, and the one insisted upon in its bill of complaint and at the trial of the cause, was the contention that the so-called Settlers Clause and proviso in the Granting Act and Acts was a condition subsequent; and in not holding and decreeing that the said defendants last named, and each and every of them, were justified and acted of right in resisting such contention, both below and on appeal; and in not holding and decreeing that inasmuch as the said defend-

ants had prevailed in resisting such contention, it was not equitable to tax them or either of them with costs and disbursements herein in favor of the complainant.

27. The Court erred in not holding and decreeing that it was inequitable to impose costs herein in favor of complainant on the said defendants; and in not holding and decreeing that the case here should be disposed of without adjudging costs in favor either of said defendants or of the complainant, leaving each to bear the costs of his or its own side of the litigation.

28. The Court erred in not making and entering as and for its decree in this cause, and in place and stead of the decree made and entered by it as aforesaid, the decree in the form tendered to it by said last-named defendants and each and every of them:—that is to say, in not making and entering as its decree in said cause the following decree:

“In pursuance of the mandate of the Supreme Court of the United States, filed in this Court on the 8th day of December, 1915, in the above-entitled cause, counsel for the respective parties being present, it is by the Court ordered, adjudged and decreed as follows:

1. That the decree heretofore entered in said cause, so far as it affects the defendants Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, Union Trust Company, individually and as trustee, hereinafter called the ‘defendants’, be and the same is hereby set aside and held for naught, but is adhered to in all respects as to the

defendants and cross-complainants, hereinafter called the 'cross-complainants' and 'interveners.'

2. That the said defendants and their respective officers and agents be, and each is hereby, enjoined from selling the lands, or any part thereof, granted either by the Act of Congress approved July 25, 1866, as amended by the Act of Congress of April 10, 1869, or by the Act of Congress approved May 4, 1870, whether the said lands be situated within the place or indemnity limits of the grants thereby made to any person not an actual settler, or in quantities greater than one-quarter section to one purchaser, or for a price exceeding two dollars and a half (\$2.50) per acre.

3. That the said defendants and their respective officers and agents be, and each is hereby, enjoined from any disposition of the said lands or any part thereof, or of the timber thereon, and from cutting or authorizing the cutting or removal of any of the timber thereon, until Congress shall have a reasonable opportunity to provide by legislation for the disposition of said lands in accordance with such policy as it may deem fitting under the circumstances, and at the same time secure to the defendants all the value the granting acts conferred upon the grantees; but if Congress does not make such provision, the defendants may apply to this Court, within a reasonable time, not less than six (6) months from the entry of the decree herein, for a modification of so much of the injunction herein ordered as enjoins any disposition of the lands and timber until Congress shall act."

WHEREFORE, this defendant, Union Trust Company, individually and as trustee, prays that the

aforesaid judgment and decree which was made, rendered and entered herein by the above-entitled Court in said cause No. 3340 in Equity, on the 9th day of December, 1915, and that each of said paragraphs of said judgment and decree be reversed, excepting paragraph 1 thereof, wherein it is provided:

“That the decree heretofore entered in said cause so far as it affects the defendants, Oregon & California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, Union Trust Company, individually and as trustee, hereinafter called ‘the defendants,’ be, and the same is hereby, set aside and held for naught, but is adhered to in all respects as to the defendants and cross-complainants, hereinafter called the ‘cross-complainants’ and the interveners,”

and particularly that paragraph 2 and that paragraph 7 of said judgment and decree be reversed, and for such other relief to this defendant, said Oregon & California Railroad Company, said Southern Pacific Company, and said Stephen T. Gage, individually and as trustee, as may be proper.

MILLER, KING, LANE & TRAFFORD,
DOLPH, MALLORY, SIMON & GEARIN,
JOHN C. SPOONER, JOHN M. GEARIN,
Solicitors for said Union Trust Company, individually
and as trustee.

Service of the foregoing Assignments of Errors admitted this 8th day of January, 1916.

JOHN W. DAVIS,
Solicitor-General of the United States.

C. J. SMYTH,

Special Assistant to the Attorney-General.

Solicitors and Attorneys for Appellee.

CLARENCE L. REAMES,

United States Attorney.

Filed January 8, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on the 8th day of January, 1916, there was duly filed in said Court and cause, a Bond on Appeal, in words and figures as follows, to wit:

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS:

That we, Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and Union Trust Company of New York, individually and as trustee, the defendants in the above entitled action, as principals, and United States Fidelity and Guaranty Company, a corporation duly organized and existing under and by virtue of the laws of the State of Maryland, and as such corporation authorized to do business and doing business in the States of California and Oregon, as surety, are held and firmly bound unto the United States of America, the complainant in the above entitled action, in the sum of Fifteen Thousand Dollars (\$15,000), to be paid to the said United States of America, complainant herein, its attorneys, officers, or assigns, and for the payment of which sum, well and truly to be made, we bind ourselves and each of us, and our and each of our successors, associates,

heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

SEALED with our seals and dated this 4th day of January, 1916.

WHEREAS, the said defendants in the above entitled action have prosecuted or are about to prosecute an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment and decree rendered and entered in the above cause No. 3340 in Equity, on the ninth day of December, 1915, which said judgment and decree is hereby referred to and made a part hereof.

NOW, THEREFORE, the condition of this obligation is such that if said defendants in the above entitled action shall prosecute their said appeal to effect and answer all damages and costs if they fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

OREGON AND CALIFORNIA RAILROAD
COMPANY,

By W. R. Scott,
Its Vice-President.

(Corporate Seal)

OREGON AND CALIFORNIA RAILROAD
COMPANY,

By G. L. King,
Its Assistant Secretary.

OREGON AND CALIFORNIA RAILROAD
COMPANY,

By Wm. F. Herrin,
P. F. Dunne,
Wm. D. Fenton,
Its Solicitors.

SOUTHERN PACIFIC COMPANY,

By W. R. Scott,
Its Vice-President.

(Corporate Seal)

SOUTHERN PACIFIC COMPANY,

By G. L. King,
Its Assistant Secretary.

SOUTHERN PACIFIC COMPANY,

By Wm. F. Herrin,
P. F. Dunne,
Wm. D. Fenton,
Its Solicitors.

UNION TRUST COMPANY OF NEW YORK,

individually and as trustee,

By Dolph, Mallory, Simon & Gearin,
Miller, King, Lane & Trafford,
John C. Spooner and John M. Gearin,
Its Attorneys and Solicitors,
and by John M. Gearin, its Attorney in Fact.

STEPHEN T. GAGE,
Individually and as Trustee.

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY,

By H. V. D. Johns,
Its Attorney in Fact, and
Bradley Carr,
Its Attorney in Fact.

(Corporate Seal)

State of California,
City and County of San Francisco,—ss.

On this 4th day of December, in the year one thousand nine hundred and sixteen, before me Hugh T. Sime, a Notary Public, in and for the City and County of San Francisco, residing therein, duly commissioned and sworn, personally appeared W. R. Scott, known to me to be the Vice-President, and G. L. King, known to me to be the Assistant Secretary, respectively, of the Oregon and California Railroad Company, of the corporation described in and that executed the within instrument, and also known to me to be the persons who executed it on behalf of the corporation therein named, and they acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office in the City and County of San Francisco, the day and year in this certificate first above written.

(Signed) HUGH T. SIME,
Notary Public in and for the City and County of San
Francisco, State of California.
(Notarial Seal)

My commission expires July 2, 1917.

State of California,
City and County of San Francisco,—ss.

On this 4th day of December, in the year one thousand nine hundred and sixteen, before me Hugh T. Sime, a Notary Public, in and for the City and County of San Francisco, residing therein, duly commissioned and sworn, personally appeared W. R. Scott, known to me to be the Vice-President, and G. L. King, known to me to be the Assistant Secretary, respectively, of the Southern Pacific Company, of the corporation described in and that executed the within instrument, and also known to me to be the persons who executed it on behalf of the corporation therein named, and they acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office in the City and County of San Francisco, the day and year in this certificate first above written.

(Signed) HUGH T. SIME,
Notary Public in and for the City and County of San
Francisco, State of California.

(Notarial Seal)

My commission expires July 2, 1917.

State of California,
City and County of San Francisco,—ss.

On this 4th day of January, in the year one thousand nine hundred and sixteen, before me, M. J. Cleveland, a Notary Public in and for the City and County of San

Francisco, personally appeared H. V. D. Johns and Bradley Carr, known to me to be the persons whose names are subscribed to the within instrument as the Attorneys in Fact of the United States Fidelity and Guaranty Company, and acknowledged to me that they subscribed the name of the United States Fidelity and Guaranty Company thereto as principal, and their own names as Attorneys in Fact.

(Signed) M. J. CLEVELAND,

Notary Public in and for the City and County of San Francisco, State of California.

(Notarial Seal)

State of California,

City and County of San Francisco,—ss.

On this 4th day of January, in the year one thousand nine hundred and sixteen, before me, E. B. Ryan, a Notary Public in and for said City and County, residing therein, duly commissioned and sworn, personally appeared Stephen T. Gage, individually and as trustee, known to me to be the person described in, whose name is subscribed to and who executed the annexed instrument, and he acknowledged to me that he executed the same as such individual and trustee as aforesaid.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office, in the said City and County of San Francisco, the day and year last above written.

(Signed) E. B. RYAN,

Notary Public in and for the City and County of San Francisco, State of California.

(Notarial Seal)

My commission expires February 25th, 1918.

The foregoing bond is hereby approved and the same shall operate as a supersedeas as to paragraph 7 of the judgment and decree referred to in said bond.

Done in open court this 8th day of January, 1916.

CHAS. E. WOLVERTON,
Judge of said District Court.

Received a copy of the within bond this 8th day of January, 1916.

JOHN W. DAVIS,
Solicitor-General.

C. J. SMYTH,
Special Assistant to the Attorney-General,
Attorneys for Complainant.

CLARENCE L. REAMES,
United States Attorney.

Filed January 8, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on Monday, the 24th day of January, 1916, the same being the 73rd judicial day of the regular November, 1915, term of said Court; present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to wit:

**ORDER EXTENDING TIME TO FILE
STATEMENT OF THE EVIDENCE.**

Now on this 24th day of January, 1916, upon motion of counsel for Oregon and California Railroad Com-

pany, Southern Pacific Company, Stephen T. Gage, individually and as trustee, Union Trust Company, individually and as trustee, defendants above named, for an order of this Court extending and enlarging the time of the said defendants, and each of them, to prepare, serve and file their, and each of their, proposed Statement of the Evidence, or proposed Bill of Exceptions, Statement, or other record as the said parties may deem advisable, complainant appearing by Clarence L. Reames, United States District Attorney, and the said defendants appearing by Wm. D. Fenton and John M. Gearin; and it appearing to the Court that good cause is shown and exists for said order, and that the said defendants are entitled thereto,

IT IS ORDERED that the time for the said defendants, and each of them, in the above entitled cause, to prepare, serve and file in said Court, their and each of their said proposed Statement of Evidence, or Bill of Exceptions, Statement, or other record as they may be advised, be and the same is hereby extended and enlarged to and inclusive of February 5th, 1916.

(Signed) CHARLES E. WOLVERTON,
District Judge.

Filed January 24, 1916. G. H. Marsh. Clerk.

And afterwards, to wit, on the 1st day of February, 1916, there was duly filed in said Court and cause, a Stipulation Relative to Record on Appeal, in words and figures as follows, to wit:

STIPULATION RELATIVE TO RECORD ON
APPEAL.

IT IS HEREBY STIPULATED by and between the complainant, United States of America, and the defendants above named, and each of them, as follows:

1. That on the appeal taken by the above named defendants on the 8th day of January, 1916, to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment and decree made and entered in the United States District Court for the District of Oregon in said cause No. 3340 in Equity, on December 9, 1915, said United States Circuit Court of Appeals may, insofar as the same may be relevant or material, consider the printed transcript of the record filed in said Circuit Court of Appeals on the former appeals taken in said cause No. 3340 from the decree of said United States District Court, entered July 1, 1913, and may consider any part or portions of said transcript, including the pleadings in the cause, the statement of the evidence and the exhibits or any of them contained in said printed transcript of record.

2. That in the event that said United States Circuit Court of Appeals should certify to the Supreme Court of the United States any questions or question or propositions or proposition of law upon which it desires the instruction of that court for its proper decision in passing upon the aforesaid appeal or that said Supreme Court should require that the whole record and cause be sent up to it for its consideration, or in the event that an appeal

should be prosecuted to said Supreme Court from any judgment rendered on the aforesaid appeal of said cause taken on said 8th day of January, 1916, to said United States Circuit Court of Appeals, or that said appeal taken on January 8, 1916, should in any other manner be hereafter brought on for hearing in said Supreme Court, said Supreme Court of the United States may, insofar as the same may be relevant or material, consider the printed transcript of the record on the aforesaid former appeals in said cause, which is now on file in said Supreme Court, including the pleadings, the statement of the evidence and the exhibits or any of them contained in said printed transcript of record.

3. Such printed transcript of the record on said former appeals, as now on file in said Circuit Court of Appeals and also on file in said Supreme Court, shall be deemed a part of the record on the aforesaid appeal taken on January 8, 1916, to said Circuit Court of Appeals, and on any appeal which may be taken to said Supreme Court from the judgment of said Circuit Court of Appeals rendered on said last mentioned appeal or in any other hearing growing out of said appeal which may be had before said Supreme Court as in last above paragraph hereof mentioned; and, as such, it may, insofar as the same may be deemed relevant or material, be referred to by counsel of any of the parties hereto, either in said Circuit Court of Appeals or in said Supreme Court.

4. There shall not be included or printed in the transcript of record on the aforesaid appeal taken by defendants on January 8, 1916, to said United States

Circuit Court of Appeals, any of the pleadings, papers or documents filed, or proceedings had, in said United States District Court in said cause prior to December 8, 1915, and the clerk of the court, in making, and directing the printing of, said transcript of record, shall omit therefrom any of said pleadings, papers, documents or proceedings filed or had in said court and cause prior to December 8, 1915—provided, however, that it may be stated or shown in said transcript on what date the mandate issued by said Supreme Court upon its opinion rendered June 21, 1915, on the former appeals in the cause (No. 679—October term, 1914) was received by the clerk of said United States District Court. Said clerk shall include, among the other papers, documents, files and proceedings to be incorporated in said transcript, a copy of said opinion of the Supreme Court and also a copy of the aforesaid mandate of said Supreme Court filed in said cause in said District Court on December 8, 1915, omitting, however, from the latter, any copy of the copy of the former decree of said United States District Court made and entered July 1, 1913, which is embodied in and forms a part of said mandate. A copy of said former decree shall not be printed in said transcript of record as a part of said mandate, but in the copy of the mandate as printed in said transcript, said former decree may be referred to by reference to the volume and pages of the record on the former appeals taken in said cause wherein a copy of said former decree is set out.

5. If any statement of the record or statement on appeal which may be prepared by the appellants or any of them they may wish to insert a copy of said mandate

in and as a part of said statement, they need not incorporate in said statement of the record or statement on appeal or in any statement of the record or statement on appeal which may be filed by any of them in said cause, a copy of said former decree in said District Court entered July 1, 1913, but they may in said copy of the mandate simply refer to said former decree by reference to the volume and pages of the record on said former appeals wherein a copy of said former decree is set out.

6. It is further stipulated that an order of this court may be made upon this stipulation containing the provisions and substantially in the language as above set forth in paragraphs 4 and 5 hereof.

7. It is further understood and agreed that the complainant denies the right of the defendants to appeal to the Circuit Court of Appeals from the decree entered by said United States District Court on December 9, 1915, denies the jurisdiction of said Circuit Court of Appeals to hear and determine said appeal and reserves its right to object to the defendants prosecuting said appeal and to the jurisdiction of the Circuit Court of Appeals in the matter and that this stipulation shall not in any wise prejudice said rights or any of them, or the right of the complainant to insist upon them, but in the event that said Circuit Court of Appeals takes jurisdiction the complainant does not waive but reserves any right it may have to confine the inquiry of the court on the appeal to a consideration of said mandate of the Supreme Court of the United States and the decree of said District Court entered December 9, 1915.

8. It is further stipulated and agreed in this regard that the sole purpose of this stipulation is to save expense in the printing of the record and to avoid any duplication of the record on the present appeal.

Dated: February 1st, 1916.

CLARENCE L. REAMES,
United States Attorney for Oregon for and by direction
of the Attorney-General of the United States, of
Solicitors and Attorneys for Complainant.

WM. F. HERRIN,
P. F. DUNNE and
WM. D. FENTON,
Solicitors for Oregon and California R. R. Co., Southern
Pacific Co. and Stephen T. Gage, individually and
as trustee,

MILLER, KING, LANE & TRAFFORD,
DOLPH, MALLORY, SIMON & GEARIN,
Solicitors for Union Trust Company, individually and
as trustee.

Filed February 1, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on Tuesday, the 1st day of February, 1916, the same being the 80th judicial day of the regular November, 1915, term of said Court; present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to wit:

ORDER REGARDING PRINTING OF
RECORD.

This cause came on for hearing this day upon stipulation of the respective parties, dated January —, 1916, as to the printing of the record on the appeal of the defendants, taken to the United States Circuit Court of Appeals for the Ninth Circuit, from the decree of this court entered December 9, 1915, and as to the use in said Circuit Court of Appeals and in the Supreme Court of the United States, as a part of the record on appeal, of the printed transcript of record of the former appeals taken in above cause No. 3340 from the decree of said District Court for the District of Oregon entered July 1, 1913, and it appearing to the court that the parties have made and filed a written stipulation wherein it is provided, among other things, that an order substantially to the following effect may be made by this court:

It is now therefore ordered that:

1. There shall not be included or printed in the transcript of record on the aforesaid appeal taken by defendants on January 8, 1916, to said United States Circuit Court of Appeals any of the pleadings, papers or documents filed, or proceedings had, in said United States District Court in said cause prior to December 8, 1915, and the clerk of the court, in making, and directing the printing of, said transcript of record, shall omit therefrom any of said pleadings, papers, documents or proceedings filed or had in said court and cause prior to December 8, 1915—provided, however, that it may be stated or shown in said transcript on what date the man-

date issued by said Supreme Court upon its opinion rendered June 21, 1915, on the former appeal of the cause (No. 679—October term, 1914) was received by the clerk of said United States District Court. Said clerk shall include, among the other papers, documents, files and proceedings to be incorporated in said transcript, a copy of said opinion of the Supreme Court and also a copy of the aforesaid mandate of said Supreme Court filed in said cause in said District Court on December 8, 1915, omitting, however, from the latter, any copy of the copy of the former decree of said United States District Court made and entered July 1, 1913, which is embodied in and forms a part of said mandate. A copy of said former decree shall not be printed in said transcript of record as a part of said mandate, but in the copy of the mandate as printed in said transcript, said former decree may be referred to by reference to the volume and pages of the record on the former appeals taken in said cause wherein a copy of said former decree is set out.

2. If in any statement of the record or statement on appeal which may be prepared by the appellants or any of them they may wish to insert a copy of said mandate in and as a part of said statement, they need not incorporate in said statement of the record or statement on appeal or in any statement of the record or statement on appeal which may be filed by any of them in said cause, a copy of said former decree in said District Court entered July 1, 1913, but they may in said copy of the mandate simply refer to said former decree by reference to the volume and pages of the record on said former appeals wherein a copy of said former decree is set out.

3. This order is without prejudice to the right of the complainant to object to the right of the defendants to take said appeal and to the power of the court of appeals to hear and determine it and is not to be construed as a waiver of any right the complainant has to object to the defendants taking said appeal or to the Circuit Court of Appeals hearing and determining it or as a waiver of its right to have the court of appeals confine its inquiry on the appeal to the mandate of said Supreme Court and the decree of this court, entered December 9, 1915.

Dated February 1st, 1916.

CHAS. E. WOLVERTON,
Judge of said District Court.

Filed February 1, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on the 1st day of February, 1916, there was duly filed in said court and cause, a Statement of the Case, in words and figures as follows, to wit:

STATEMENT OF THE CASE.

Be it remembered that on the 8th day of December, 1915, the above cause, No. 3340, in Equity, came on for hearing before the above named Court upon the form of the decree to be entered therein under and in pursuance of the mandate theretofore issued from the Supreme Court of the United States on the opinion and decree of said Supreme Court reversing the decree made and entered by the above entitled Court, in said cause, on the first day of July, 1913, and remanding the cause for further proceedings in accordance with said opinion.

Mr. Constantine J. Smyth, special assistant to the Attorney-General, and Mr. Clarence L. Reames, United States District Attorney for the District of Oregon, represented the complainant. Mr. Peter F. Dunne and Mr. Wm. D. Fenton represented the defendants, Oregon and California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as trustee, and Mr. John M. Gearin, represented the defendant, Union Trust Company of New York, individually and as trustee, and the cross-complainants and interveners in said cause were represented by their respective counsel, Mr. A. W. Lafferty and Mr. L. C. Garrigus.

On motion of counsel for the complainant, the Court ordered that said mandate of the Supreme Court be filed, and the same was thereupon filed with the clerk of this Court.

The complainant, through its counsel, then submitted to the Court the following form of decree as being in conformity with said opinion and mandate of the Supreme Court of the United States, viz:

*"In the District Court of the United States, for the
District of Oregon.*

The United States of America,

Complainant,

vs.

Oregon and California Railroad Company, et al,

Defendants,

John L. Snyder, et al,

Defendants and Cross-Complainants,

William F. Slaughter, et al,

Interveners.

DECREE.

In pursuance of the mandate of the Supreme Court of the United States filed in this court on the —— day of —— in the above entitled cause, counsel for the respective parties being present, it is by the Court ordered, adjudged and decreed as follows:

1. That the decree heretofore entered in said cause so far as it affects the defendants, Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, Union Trust Company, individually and as trustee, hereinafter called "the defendants," be, and the same is hereby, set aside and held for naught, but is adhered to in all respects as to the defendants and cross-complainants, hereinafter called the "cross-complainants," and the interveners.

2. That the defendants and their respective officers and agents be, and each is hereby, enjoined from selling the lands or any part thereof granted either by the Act of Congress approved July 25, 1866, as amended by the Act of Congress of April 10, 1869, or by the Act of Congress approved May 4, 1870, whether the said lands be situated within the place or indemnity limits of the grants thereby made, to any person not an actual settler on the land sold to him, or in quantities greater than one-quarter section to one purchaser, or for a price exceeding \$2.50 per acre; and from selling any of the timber on said lands, or any mineral or other deposits therein, except as a part of and in conjunction with the land on which the timber stands or in which the mineral or other

deposits are found; and from cutting or removing or authorizing the cutting or removal of any of the timber thereon; or from removing or authorizing the removal of mineral or other deposits therein, except in connection with the sale of the land bearing the timber or containing the mineral or other deposits.

3. That the defendants and their respective officers and agents be, and each is hereby, enjoined from making or agreeing to make, either directly or indirectly, any disposition whatsoever of said lands or of any part thereof, or of the timber thereon or any part thereof, or of any mineral or other deposits therein; from cutting, removing, or authorizing the cutting or removal of the timber thereon or any part thereof; and from removing or authorizing the removal of mineral or other deposits therein; from disposing of, receiving or exerting any control over any money which arose, or may hereafter arise, from said lands, either through sales thereof or of timber thereon, or through condemnation proceedings or otherwise, and now on deposit, or which may hereafter be placed on deposit, with any bank, clerk of court, or other institution or person, to await the final decision of the Supreme Court of the United States in this case, until Congress shall have a reasonable opportunity to make provision by legislation for the disposition of said lands, timber, money, mineral or other deposits, in accordance with such policy as Congress may deem fitting, under the circumstances, and at the same time secure to the defendant all the value that the said granting acts conferred upon the grantees.

4. That if Congress does not make provision for the

disposition as aforesaid of said lands, money, timber, mineral or other deposits, the defendants may apply to the court within a reasonable time, but not less than six months from the entry of this decree, for a modification of so much of the injunction herein ordered as forbids any disposition of the said lands, timber, money, mineral or other deposits, or any part thereof, until Congress shall act, and the court hereby reserves the right to modify this decree in that regard if, in its opinion, good cause shall then exist for doing so.

5. That this decree shall apply not only to all said grant lands unsold at the time this action was instituted, but also to all such grant lands sold prior to the institution of the action which have since reverted or shall hereafter revert to the defendants or any one of them.

6. That the complainant shall have the right to apply to the court at any time hereafter for an accounting as to all moneys received by the defendant from or on account of the lands covered by said granting acts, and the court retains jurisdiction over the action for the purpose of granting such application if good cause therefor appears.

7. That this decree shall be without prejudice to any other suits, rights or remedies which the government may have by law or under the Joint Resolution of Congress passed April 30, 1908, or under the Act of Congress passed August 20, 1912.

8. That the complainant have and recover from the defendants, Oregon and California Railroad Com-

pany, Southern Pacific Company, Stephen T. Gage, Union Trust Company, the cross-complainants and interveners, and each of them, its lawful costs and disbursements herein, taxed at \$——, and that execution issue therefor.

Done in open court this —— day of December, 1915.

BY THE COURT,

Judge.”

And the counsel for the complainants asked the Court to adopt the aforesaid form of decree submitted by them as the form of decree to be entered upon said mandate.

The defendants, Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and the defendant, Union Trust Company of New York, individually and as trustee, then submitted to the Court the following form of decree as being in conformity with said opinion and mandate of the Supreme Court of the United States, viz:

“Title of Court and Cause as contained in foregoing
Form of Decree submitted by the Complainant.

In pursuance of the mandate of the Supreme Court of the United States, filed in this Court on the —— day of December, 1915, in the above entitled cause, counsel for the respective parties being present, it is by the Court ordered, adjudged and decreed, as follows:

1. That the decree heretofore entered in said cause, so far as it affects the defendants Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, Union Trust Company, individually and as trustee, hereinafter called the "defendants," be, and the same is, hereby set aside, and held for naught, but adhered to in all respects as to the defendants and cross-complainants, hereinafter called the "cross-complainants," and the "interveners."

2. That the said defendants and their respective officers and agents be and each is hereby enjoined from selling the lands, or any part thereof, granted either by the Act of Congress approved July 25, 1866, as amended by the Act of Congress of April 10, 1869, or by the Act of Congress approved May 4, 1870, whether the said lands be situated within the place or indemnity limits of the grants thereby made, to any person not an actual settler, or in quantities greater than one-quarter section to one purchaser, or for a price exceeding two dollars and a half (\$2.50) per acre.

3. That the said defendants and their respective officers and agents be, and each is hereby enjoined from any disposition of the said lands, or any part thereof, or of the timber thereon, and from cutting, or authorizing the cutting, or removal of any of the timber thereon, until Congress shall have a reasonable opportunity to provide by legislation for the disposition of said lands, in accordance with such policy as it may deem fitting under the circumstances, and at the same time secure to the defendants, all the value the granting acts conferred

upon the grantees; but if Congress does not make such provision, the defendants may apply to this Court, within a reasonable time, not less than six (6) months from the entry of the decree herein, for a modification of so much of the injunction herein ordered as enjoins any disposition of the lands and timber until Congress shall act.

Done in open court this —— day of ——, 1915.

BY THE COURT,

Judge.”

And the counsel for said defendants asked the Court to sign and to order the entry of a decree in the form submitted by them as being the proper form of decree to be entered upon said mandate.

After arguments had by the respective counsel, the Court took under advisement the matter of the form of the decree to be entered upon said mandate; and on the 9th day of December, 1915, the Honorable Charles E. Wolverton, Judge of this Court, presiding on the aforesaid hearing, signed the following form of decree, viz:

“Title of Court and Cause as contained in foregoing
Form of Decree submitted by the Complainant.

In pursuance of the mandate of the Supreme Court of the United States filed in this court on the 8th day of December, 1915, in the above entitled cause, counsel for the respective parties being present, it is by the Court ordered, adjudged and decreed as follows:

1. That the decree heretofore entered in said cause so far as it affects the defendants, Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, Union Trust Company, individually and as trustee, hereinafter called "the defendants," be, and the same is hereby, set aside and held for naught, but is adhered to in all respects as to the defendants and cross-complainants, hereinafter called the "cross-complainants," and the interveners.

2. That the defendants and their respective officers and agents be, and each is hereby, enjoined from selling the lands or any part thereof granted either by the Act of Congress approved July 25, 1866, as amended by the Act of Congress of April 10, 1869, or by the Act of Congress approved May 4, 1870, whether the said lands be situated within the place or indemnity limits of the grants thereby made, to any person not an actual settler on the land sold to him, or in quantities greater than one-quarter section to one purchaser, or for a price exceeding \$2.50 per acre; and from selling any of the timber on said lands, or any mineral or other deposits therein, except as a part of and in conjunction with the land on which the timber stands or in which the mineral or other deposits are found; and from cutting or removing or authorizing the cutting or removal of any of the timber thereon; or from removing or authorizing the removal of mineral or other deposits therein, except in connection with the sale of the land bearing the timber or containing the mineral or other deposits.

3. That the defendants and their respective officers and agents be, and each is hereby, enjoined from making

or agreeing to make, either directly or indirectly, any disposition whatsoever of said lands or of any part thereof, or of the timber thereon or any part thereof, or of any mineral or other deposits therein; from cutting, removing, or authorizing the cutting or removal of the timber thereon or any part thereof; from removing or authorizing the removal of mineral or other deposits therein; and from disposing of, receiving or exerting any control over any money which arose, or may hereafter arise, from said lands, either through sales thereof or of timber thereon, or through condemnation proceedings or otherwise, and now on deposit, or which may hereafter be placed on deposit, with any bank, clerk of court, or other institution or person, to wait the final decision of the Supreme Court of the United States in this case, until Congress shall have a reasonable opportunity to make provision by legislation for the disposition of said lands, timber, money, mineral or other deposits, in accordance with such policy as Congress may deem fitting, under the circumstances, and at the same time secure to the defendant all the value that the said granting acts conferred upon the grantees.

4. That if Congress does not make provision for the disposition as aforesaid of said lands, money, timber, mineral or other deposits, the defendants may apply to the court within a reasonable time, but not less than six months from the entry of this decree, for a modification of so much of the injunction herein ordered as forbids any disposition of the said lands, timber, money, mineral or other deposits, or any part thereof, until Congress shall act, and the court hereby reserves the right to mod-

ify this decree in that regard if, in its opinion, good cause shall then exist for doing so.

5. That this decree shall apply not only to all said grant lands unsold at the time this action was instituted, but also to all such grant lands sold prior to the institution of the action which have since reverted or shall hereafter revert to the defendants or any one of them.

6. That this decree shall be without prejudice to any other suits, rights or remedies which the government may have by law or under the Joint Resolution of Congress passed April 30, 1908, or under the Act of Congress passed August 20, 1912, against the defendants or any of them.

7. That the complainant have and recover from the defendants, Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and Union Trust Company, individually and as trustee, and each of them, its lawful costs and disbursements herein, taxed at \$6249.02, and that execution issue therefor.

Done in open court this 9th day of December, 1915.

BY THE COURT,

(Signed) Charles E. Wolverton,
Judge."

And said decree was thereupon on said 9th day of December, 1915, entered as the judgment and decree of this Court.

The defendants, Oregon and California Railroad Company, Southern Pacific Company, Stephen T.

Gage, individually and as trustee, and Union Trust Company of New York, individually and as trustee, duly excepted to the entry of said form of decree last mentioned, and also to the failure of said Judge to sign a decree in the aforesaid form submitted by them.

Said defendants now present to the Court this their Statement of the Case, and ask the Court to approve of the same and to direct that it be filed in the Clerk's office of this Court and that it become a part of the record for the purposes of the appeal, taken by said defendants on January 8th, 1916, from said judgment and decree of this Court entered December 9, 1915, as aforesaid. This statement is not intended to be and is not a statement of the case or agreed statement under federal equity rule seventy-seven but is submitted as a statement analogous to the statement of the evidence provided for in federal equity rule seventy-five.

WM. F. HERRIN,

P. F. DUNNE and

WM. D. FENTON,

Attorneys for Appellants, Oregon and California Railroad Company, Southern Pacific Company, and Stephen T. Gage, individually and as trustee.

MILLER, KING, LANE & TRAFFORD,

DOLPH, MALLORY, SIMON & GEARIN,

Attorneys for Appellant, Union Trust Company of New York, individually and as trustee.

District of Oregon,

County of Multnomah,—ss

Due service of the within statement of the case is admitted this 1st day of February, 1916.

CLARENCE L. REAMES,
of Solicitors for Complainant.

Filed February 1, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on Tuesday, the 1st day of February, 1916, the same being the 80th judicial day of the regular November, 1915, term of said Court; present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to wit:

ORDER APPROVING STATEMENT OF THE CASE.

This cause came on to be heard this day upon the application of the appellants, Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and Union Trust Company, individually and as trustee, defendants, for an order approving the statement of the case prepared and presented by the appellants, and now tendered to be filed herein, the appellants appearing by their attorneys Wm. D. Fenton and John M. Gearin, and the complainant appearing by Clarence L. Reames, United States District Attorney for the District of Oregon, representing himself and Thomas W. Gregory, Attorney-General of the United States, and C. J. Smyth, special assistant to the Attorney-General of the United States, attorneys for said complainant; and it

appearing to the Court that said statement is correct and that there is no objection to the approval thereof by this Court,

It is ordered that said Statement of the Case now tendered to be filed is hereby approved and the same is now directed to be filed in the clerk's office of this Court as of this date and to become a part of the record, for the purposes of the appeal heretofore taken by said defendants from the judgment and decree of this Court entered December 9, 1915.

Dated: February 1st, 1916.

CHAS. E. WOLVERTON,
Judge of said District Court.

District of Oregon,
County of Multnomah,—ss.

Due service of the within order approving statement of the case is admitted this 1st day of February, 1916.

CLARENCE L. REAMES,
Of Solicitors for Complainant.

Filed February 1, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on the 3rd day of February, 1916, there was duly filed in said Court and cause, a Praeceptum for Transcript of Record on Appeal, in words and figures as follows, to wit:

PRAECIPE FOR TRANSCRIPT.

To G. H. Marsh, Clerk of the above entitled Court:

Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and Union Trust Company of New York, individually and as trustee, defendants and appellants herein, request that the following record be printed on the appeal taken by said defendants to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment and decree rendered in this Court in said Cause No. 3340 on the 9th day of December, 1915, to-wit:

1. Record of proceedings of December 8, 1915.

2. Mandate of Supreme Court of the United States, filed December 8, 1915, omitting as part of said mandate the copy of the decree of this Court entered July 1, 1913, and inserting therein, in the place where the copy of said decree is inserted in said mandate, the words following, to wit:

(Here follows copy of said decree of said District Court, as the same is contained in Volume III, pages 1296-1550 of printed transcript of the record on the former appeals taken in this case from said decree of July 1, 1913, and which said transcript of the record is on file in the clerk's office of the Circuit Court of Appeals for the Ninth Circuit, the case being numbered therein 2400, and in the clerk's office of the Supreme Court of the United States, the case in the latter court being numbered 679, October term, 1914.)

3. Opinion of the Supreme Court of the United States, referred to in said mandate.

4. Decree entered December 9, 1915.

5. Cost bill of complainant, filed December 16, 1915.

6. Objections to said cost bill.

7. Order staying execution on aforesaid decree, filed December 27, 1915.

8. Order overruling objections to aforesaid cost bill.

9. Petition for appeal by defendants from decree entered December 9, 1915; filed January 8, 1916.

10. Order of January 8, 1916, allowing said appeal.

11. Assignment of errors on said appeal of Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and Union Trust Company, individually and as trustee, severally, being four in number.

12. Bond on said appeal of defendants, and order approving said bond.

13. Citation on said appeal.

14. All orders extending time of defendants to prepare, serve and file their statement of the evidence, or statement of the case, or any other statement or record or papers on appeal from said decree of December 9, 1915.

15. Stipulation regarding record on appeal, filed February 1, 1916.

16. Order regarding record on appeal, filed February 1, 1916.

17. Statement of the case.

18. Order approving said statement of the case.

19. This praecipe.

20. Any and all orders of court, and other documents or papers, relating in any way to the aforesaid appeal taken on January 8, 1916, or to the record on said appeal, which may be filed with you after the filing of this praecipe and before the printing of the record on said appeal is completed.

WM. F. HERRIN,

P. F. DUNNE,

WM. D. FENTON,

Solicitors for Defendants and Appellants Oregon and California Railroad Company, Southern Pacific Company, and Stephen T. Gage, individually and as trustee.

MILLER, KING, LANE & TRAFFORD,

DOLPH, MALLORY, SIMON & GEARIN,

Solicitors for Defendant and Appellant Union Trust Company of New York, individually and as trustee.

Received copy of the foregoing praecipe, and service of same is hereby acknowledged this 3rd day of February, 1916.

T. W. GREGORY,

Attorney-General of the United States.

C. S. SMYTH,

Special Assistant to the Attorney-General of the United States.

Solicitors for Complainant and Appellee.

CLARENCE L. REAMES,

United States Attorney.

Filed February 3, 1916. G. H. Marsh, Clerk.

And to wit, on the 1st day of February, 1916, there was duly filed in said Court and cause, a copy of an order enlarging time to file transcript of record on appeal, in words and figures as follows, to wit:

ORDER ENLARGING TIME TO FILE TRANSCRIPT OF RECORD.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as Trustee, and Union Trust Company, individually and as trustee,

Defendants and Appellants,

v.

United States of America,

Complainant and Appellee.

No.

**ORDER ENLARGING TIME TO FILE
TRANSCRIPT.**

Now, at this time, February 1st, 1916, on motion of counsel for Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and Union Trust Company, individually and as trustee, defendants above named and appellants in the above entitled cause, for an order of Court enlarging and extending the time for the said appellants, and each of them, to file with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, the record on the appeal heretofore taken by said defendants and appellants from the judgment and decree entered on the 9th day of December, 1915, in the District Court of the United States for the District of Oregon in cause No. 3340 in Equity, in favor of the complainant, and for an order enlarging and extending the time for said defendants and appellants, and each of them, to docket said cause in said Circuit Court of Appeals; and it appearing to the undersigned Judge of the District Court of the United States for the District of Oregon, who signed the citation on said appeal, that good cause is shown and exists for said order;

IT IS ORDERED that the time for said defendants and appellants, and that the time for each of said defendants and appellants to file the record on the aforesaid appeal in said cause with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and to docket the case with said Clerk, be and the same

is hereby enlarged and extended to and including the 9th day of March, 1916.

CHAS. E. WOLVERTON,
United States District Judge.

Attest:

(Seal) G. H. Marsh,
Clerk, United States District Court,
District of Oregon.

District of Oregon,
County of Multnomah,—ss.

Due service of the within Order and Notice of Application therefor is hereby accepted in said county, Oregon, this 1st day of February, 1916, by receiving a copy thereof duly certified to as such by William D. Fenton, of attorneys for defendants and appellants.

CLARENCE L. REAMES,
of Solicitors for Complainant.

C. J. SMYTH,
Special Assistant to the Attorney General.

Filed February 1, 1916. G. H. Marsh, Clerk.

OPINION OF THE SUPREME COURT OF
THE UNITED STATES, ATTACHED TO
THE FOREGOING TRANSCRIPT PUR-
SUANT TO STIPULATION AND ORDER
OF COURT.

Supreme Court of the United States.

No. 679. October Term, 1914.

On Certificate from and Writ of Certiorari to the
United States Circuit Court of Appeals
for the Ninth Circuit.

Oregon & California Railroad Company et al.,
Defendants and Appellants,
John L. Snyder et al.,
Cross Complainants and Appellants,
William F. Slaughter et al.,
Interveners and Appellants,
vs.

The United States,

(June 21, 1915.)

This writ brings up for review a decision of the United States District Court for the District of Oregon decreeing the forfeiture of the unsold portion of certain lands granted by Congress to certain railroad companies and quieting title of the United States thereto.

In consequence of a memorial presented to it, Congress, on April 30, 1908, adopted a joint resolution which authorized and directed the Attorney General of the United States to institute and prosecute any and all suits in equity, actions at law, or other proceedings, to enforce any rights or remedies of the United States arising and growing out of either of the following acts of Congress, towit: "An act granting lands to aid in the construction of a railroad and telegraph line from the

Central Pacific Railroad in California, to Portland, in Oregon," approved July 25, 1866, c. 242, 14 Stat. 239, as amended by the acts approved June 25, 1868, c. 80, 15 Stat. 80, and April 10, 1869, c. 27, 16 Stat. 47, and "An act granting lands to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, in the State of Oregon," approved May 4, 1870, c. 69, 16 Stat. 94.

The Attorney General was empowered to assert all rights and remedies existing in favor of the United States, including the claim on behalf of the United States that the lands granted by such acts, or any part of the lands, have been or are forfeited to the United States by reason of any breaches or violations of the terms or conditions of either of such acts which may be alleged or established in such suits, actions or proceedings.

The resolution declared that it was not intended to determine the right of the United States to any such forfeiture or forfeitures, but to fully authorize the Attorney General to assert on behalf of the United States, and the court or courts before which such suits, actions or proceedings might be instituted or pending to entertain, consider and adjudicate, the claim and right of the United States to such forfeiture or forfeitures, and, if found, to enforce the same. Res. 18, 35 Stat. 571.

Being so authorized, the United States brought this suit as complainant against the Oregon & California Railroad Company, the Southern Pacific Company, Stephen T. Gage (individually and as trustee), the Union Trust Company (individually and as trustee), John L.

Snyder, and certain others as defendants, to declare forfeited to the United States lands of the Oregon & California Railroad Company aggregating 2,300,000 acres which inured to the predecessors in interest of the company under the acts of Congress referred to in the resolution.

The bill set forth the acts of Congress and alleged that it was expressed that neither the amendatory act of April 10, 1869, nor the act of 1866 should be construed to entitle more than one company to the grant of land, and that following such provision which was in the act of 1869 there was this proviso: "And provided further, That the lands granted by the act aforesaid (act of 1866) shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre."

That the act of May 4, 1870, also contained the provision (section 4) that the lands granted thereby, excepting only such as were necessary for depots and other needful uses in operating the road, "should be sold by the company only to actual settlers, in quantities not exceeding one hundred and sixty acres or a quarter section to any one settler, and at prices not exceeding two dollars and fifty cents per acre."

The bill also detailed the organization of companies and the steps taken by them to avail themselves of the grants and accomplish the purpose for which they were made; the steps and proceedings in the construction of the roads contemplated; the issue of patents for the

lands granted; the amount of land sold and unsold, and wherein and by what acts there had been breaches of the provisions of the acts above set forth, which were alleged to have been conditions subsequent, and that by such breaches the grants had become forfeited. The bill likewise detailed the various steps and the proceedings whereby the Oregon & California Railroad Company became the owner of the grants, the connection of the defendants, Southern Pacific Company, Gage and the Union Trust Company therewith, and the rights they asserted therein.

It was alleged that each of the other defendants (other than the railroad company, the Southern Pacific Company, Gage and the Union Trust Company) asserted an interest in the lands, created, as they alleged, by actual settlement in good faith upon certain of the unsold lands, not exceeding one quarter section, with intention of making a permanent home thereof, and had applied to the railroad company to purchase the same; that the said defendants had instituted suits against the railroad company, Gage and the Union Trust Company to compel a sale and conveyance of the lands to them; that unless enjoined they would prosecute their suits to final judgments, and that they were hence made parties to this suit in order that they might be so enjoined, and, if the court so order, be permitted to set forth their respective claims for adjudication.

The bill prayed a forfeiture of the unsold lands and that the title of the Government thereto be quieted, or, if such relief be denied, that the lands be adjudged sub-

ject to purchase by actual settlers in quantities not exceeding 160 acres to any one purchaser and at a price not exceeding \$2.50 per acre; that a receiver be appointed to sell the lands and account for the proceeds "as the court shall direct."

If such relief be denied, that a mandatory injunction issue requiring the railroad company to offer for sale and to sell the lands as required by the grants. And the bill also prayed that all of the defendants be enjoined from asserting any right, title or interest in and to the lands or committing waste thereon and for an accounting of all moneys received from the sale of lands or timber.

The persons who asserted interests acquired by actual settlement were made parties to this suit and the causes consolidated, and Snyder and others filed cross complaints herein setting up their alleged rights. And there were about 6,000 other persons who by the court were permitted as interveners to present their claims for consideration and adjudication. They are represented in the record by the petition and papers of B. W. Nunnally and others.

The cross complainants alleged that they were actual settlers upon the lands granted by the act of May 4, 1870, long prior to the institution of any suit or the assertion of any claim of forfeiture by the Government; and the petitions in intervention averred that the petitioners were applicants to purchase lands granted by that act or the act of July 25, 1866; and both cross complaints and petitions respectively alleged in sub-

stance that the lands were granted in trust to the respective grantee companies for actual settlers or those who should become such, and alleged respectively tender of the purchase price, demand for conveyances and the refusal of the railroad company to accept the tender or make the conveyances. And both cross complainants and interveners asserted a prior right to the extent of the land demanded by them, respectively; denied that the grants had become forfeited, and resisted the relief prayed by the Government. They adopted in all other particulars the allegations of the bill and relied upon them as the basis of their respective claims; prayed that the railroad company be decreed to hold in trust the legal title to the land respectively claimed by them, that their several rights be established and enforced, and that the railroad company be directed to convey to each of them the tract of land applied for by each, and for general relief.

Demurrers were sustained to the cross complaints and to the petitions in intervention. Demurrers to the bill were overruled. 186 Fed. Rep. 861. Joint and several answers were then filed by the railroad company, the Southern Pacific Company and Gage. The Union Trust Company answered separately. These companies when referred to collectively will be called defendants.

The answers admitted most of the allegations of the bill and denied others; alleged facts in resistance to the construction of the Government of the acts of Congress and to the relief prayed, justified the alleged breaches of the conditions or covenants of the grants, and set up

laches, waiver of the breaches, and statutes of limitation.

A great deal of testimony was taken, but the case was practically submitted and a decree entered upon a stipulation of facts made by the Government and defendants. It of itself is quite voluminous, but we deem only certain of its facts material.

By the act of July 25, 1866, *supra*, (c. 242, 14 Stat. 239) Congress authorized and empowered the California & Oregon Railroad Company, which had been organized under a statute of the State of California, and such company, organized under the laws of Oregon, as the legislature of that State should designate, to construct and maintain a railroad and telegraph line between the city of Portland, in Oregon, and the Central Pacific Railroad in California, as follows: The California & Oregon Company to construct that part of the railroad and telegraph line within the State of California, beginning at a point to be selected by the company on the Central Pacific Railroad in Sacramento Valley, and running thence northerly through the Sacramento and Shasta Valleys to the northern boundary of the State. The Oregon company to construct the part in Oregon from Portland south through certain designated valleys to the southern boundary of Oregon to connect with the part constructed by the first-named company. Whichever company first completed its respective part of the road from the designated terminus to the boundary line between the States was authorized to continue construction until the parts should meet and connect, and the whole line of railroad and telegraph should be completed.

Section 2 of the act granted to the companies, their successors and assigns, "for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the line of said railroad, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile (ten on each side) of said railroad line."

In case of deficiency in the original sections granted other lands might be selected in lieu thereof. Upon the filing of the survey of the railroad the lands granted were to be withdrawn from public sale so far as located within the limits designated. And it was provided that the lands granted should be applied to the building of the said road within the States, respectively, wherein they were situated; and that the lands reserved by the Government should not be sold except at double the minimum price of public lands, with provisions for sale to actual settlers under the preemption and the homestead laws.

Section 3 granted to the companies the right of way through the public lands "for the construction of said railroad and telegraph line" 100 feet in width on each side of the road, including grounds for stations, etc., and the right to take from the public lands materials for the construction of the road.

Section 4 provided that when 20 or more consecutive miles of any portion of the railroad and telegraph line should be ready for the service contemplated, commis-

sioners should be appointed by the President to examine the same, and if it should appear that 20 miles had been completed and equipped in all respects as required by the act, and the commissioners should so report under oath to the President of the United States, patents should issue to the companies or either of them, as the case might be, to the extent of the completed section, and successively as 20 or more miles should be constructed, until the entire railroad and telegraph line authorized by the act should be constructed, and patents to the lands granted should be issued.

Section 5 expressed that the grants were made upon the condition that the companies should keep the railroad and telegraph in repair and use and transport the mails and dispatches for the Government when required to do so by any department thereof; that the Government should have the preference in the use of the railroad and telegraph at reasonable rates not exceeding those paid by private parties, and that the road should remain a public highway for the use of the Government, free of toll or other charges upon the transportation of the property or troops of the United States, and at the cost and charge of the corporation or companies.

Section 6 required assent to the act to be filed in the Department of the Interior within one year after the passage of the act, and that the first section of 20 miles should be completed within two years and 20 miles in each year thereafter, and the whole on or before July 1, 1875; and the road to be of the same gauge as the

Central Pacific Railroad of California and be connected therewith.

Section 7 required the roads to be operated and used as one connected and continuous line and afford to the Government and the public equal advantages and facilities as to rates, time and transportation.

Section 8 provided that for failure to file assent to the act or to complete the road as required the act should be null and void, "and all the lands not conveyed by patent to said company or companies, as the case may be, at the date of such failure, shall revert to the United States." And it was provided if the road and telegraph should not be kept in repair and fit for use the United States might put the same in repair and use and might devote the income of the road and telegraph line to repay all expenditure caused by the default of the companies or either of them, or might fix pecuniary responsibility not exceeding the value of the lands granted.

Section 9 provided that wherever the word "company" or "companies" was used in the act it should be construed to embrace the words "their associates, successors and assigns" the same as if the words had been inserted or thereto annexed.

Sections 10 and 11 are not material to be quoted. And Section 12 provided that Congress might, at any time, having due regard for the right of the companies, "add to, alter, amend or repeal" the act.

To avail of the grant, the Oregon Central Railroad Company was incorporated October 6, 1866. It

projected its road from Portland to Forest Grove, thence southerly on the westerly side of the Willamette River and became known as the "West Side Company" and its railroad line as the "West Side Line."

The legislature of Oregon, by joint resolution adopted October 10, 1866, designated the Oregon Central as the road to receive the land grant. (There were certain steps in the organization of the Company not important.)

The assent of the company to the act of 1866 was filed in the office of the Secretary of the Interior and subsequently (August 20, 1868) a map of survey of its projected line.

April 22, 1867, certain persons, contending that the West Side Company had not been lawfully incorporated or organized, and designing to secure the grants and other benefits under the act of 1866, caused proceedings to be taken, intending to organize under the general laws of Oregon the Oregon Central Railroad Company of Salem, and so named in its articles of incorporation. It projected its line of railroad on the easterly side of the Willamette River and became known as the "East Side Company" and its railroad line as the "East Side Line."

In furtherance of its design it procured from the legislature of Oregon on October 20, 1868, the adoption of a joint resolution which declared that the West Side Company was not properly incorporated and was incapable of receiving the grant, and designated the Ore-

gon Central Railroad Company organized at Salem on April 22, 1867, "as the company entitled to receive the lands in Oregon, and the benefits and privileges conferred by the said act of Congress." Oregon Session Laws, 1868.

Controversy arose between the companies as to which was entitled to the benefits of the act of 1866, which controversy continued until about January, 1870.

The controversy was carried to Congress and on April 10, 1869, Congress passed an act which amended section 6 of the act of 1866 so as to allow any railroad company theretofore designated by the legislature of Oregon to file its assent to the act of 1866 within one year from the date of the amending act and providing that nothing therein contained should impair any rights theretofore acquired by any railroad company; but declaring that neither the act of 1866 nor the amending act should be construed to entitle more than one company to a grant of land. *"And provided further, That the lands granted by the act aforesaid (act of 1866) shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre."*

On June 8, 1869, the East Side Company adopted a resolution which recited the act of July, 1866, its designation by the legislature of Oregon as the company to receive the grant, the passage of the act of April 10, 1869, and concluded as follows: "This company, the Oregon Central Railroad of Salem, Oregon, * * * do hereby accept all the provisions, rights, privileges,

and franchises of said act of July 25, 1866, * * * and of all acts amendatory thereof, and upon the conditions therein specified, and do hereby give our assent and the assent of such company thereto."

A certified copy of the resolution was filed in the office of the Secretary of the Interior June 30, 1869, and in the following October a map of survey of location of the first 60 miles of the projected line. On December 24th, following, the company completed the first 20 miles within the prescribed time, and the same was examined and approved by commissioners appointed therefor pursuant to the provisions of section 4 of the act of 1866.

March 16, 1870, the Oregon & California Railroad Company was incorporated, and, on March 29, 1870, the East Side Company assigned to it all of its property, including the land grant, with present and future rights under the act of July, 1866, and acts amendatory thereof and supplemental thereto, and by virtue of any act or resolution of the legislature of Oregon, and by the action of its stockholders the East Side Company was dissolved and its stock canceled.

Resolutions were adopted by the Oregon & California Railroad Company accepting the transfer and also a resolution accepting the act of 1866 and amendments thereto, and "all the benefits and emoluments therein or thereof granted, and upon the terms and conditions therein specified", and authorizing its assent to be filed with the Secretary of the Interior and a copy of the deed of assignment from the Oregon Central

Railroad Company. This was done, and since the date of the transfer (March 29, 1870) the Oregon & California Railroad Company has assumed and still assumes itself to be the successor of the East Side Company and of all its rights under the acts of Congress.

The West Side Company abandoned all claims under the act of 1866 and solicited and obtained from Congress, by the act of May 4, 1870, a grant of other lands. The act recited (Sec. 1) that for the purpose of aiding in the construction of a railroad and telegraph line from Portland to Astoria, and from a suitable point of junction near Forest Grove to the Yamhill River, near McMinnville, in the State of Oregon, there is granted to the Oregon Central Railroad Company, now engaged in constructing the said road, and to their successors and assigns, the right of way through the public lands, and the right to take materials from the public lands and necessary lands for depots, etc., not exceeding 40 acres at any one place; and also 20 alternate sections per mile of the public lands, not mineral, excepting coal or iron lands, designated by odd numbers, not disposed of or reserved or held by valid preemption or homestead rights at the time of the passage of the act.

There was the usual provision for selecting other lands in case of deficiency; the survey of the lands along the line of the railroad; the segregation of lands upon the survey and location of 20 or more miles of road; and for the disposition of the lands reserved by the Government within the limits of the grant only to actual settlers at double the minimum price for such lands.

The issuance of patents was provided (Sec. 3) upon the completion and equipment of 20 mile sections of the railroad.

By section 4 it was enacted "That the said alternate sections of land granted by this act, excepting only such as are necessary for the company to reserve for depots, stations, side tracks, wood yards, standing ground, and other needful uses in operating the road, shall be sold by the company only to actual settlers, in quantities not exceeding one hundred and sixty acres or a quarter section to any one settler, and at prices not exceeding two dollars and fifty cents per acre."

It was provided (Sec. 5) that the Company should, by mortgage or deed of trust to two or more trustees, appropriate and set apart the net proceeds of the lands as a sinking fund, to be kept invested in United States bonds or other safe securities for the purchase from time to time of the first mortgage construction bonds on the road, depots, etc., and that no part of the funds should be applied to any other purpose until all of the bonds should have been purchased or redeemed or canceled.

An assent to the act was required to be filed with the Secretary of the Interior (Sec. 6) and it was expressed that the grant was upon the condition that 20 miles or more of the road should be completed within two years and the entire road and telegraph line within six years from the date of the act.

In this act Congress, by the words "Oregon Central Railroad Company," referred to the West Side Company.

On July 20, 1870, the West Side Company filed its assent to the act in the office of the Secretary of the Interior.

During the year 1870 the Oregon & California Railroad Company procured, by mortgage bonds, approximately \$8,000,000, and during the year 1871 the West Side Company in the same way procured about \$1,000,000. With the funds thus procured the lines of railroad contemplated by the act of 1866 and the act of May 4, 1870, respectively, were prosecuted continuously until about January, 1873.

As stated, the East Side Company completed the construction of the first 20 miles of its railroad, and the Oregon & California Railroad Company, after the assignment and transfer to it, as stated, continued construction in 1870, 1871 and 1872 for a distance of approximately 197 miles; and the West Side Company, with the funds procured by it in 1871, constructed its line under the act of 1870 from Portland to McMinnville, a distance of approximately 47 miles. There was no other construction by the West Side Company, and the lands contiguous to the line of road from Forest Grove to Astoria was forfeited by act of Congress of January 31, 1885.

Financial vicissitudes came to both companies and construction was suspended. It was never resumed by the West Side Company, and the East Side Company, under its new name of Oregon & California Railroad Company, finally became, by the assignment of the West Side Company, the owner of the grants under both acts.

The consideration of the conveyance was the payment of the debts of the West Side Company. Since the date of the conveyance the Oregon & California Railroad Company has assumed and still assumes itself to be the successor of the West Side Company in and to all of the rights, franchises and property granted or intended to be granted by the act of May 4, 1870.

Further financial difficulties impeded the construction of the road and these were met by the various processes detailed in the stipulation of facts, and which we omit except as referred to in the opinion. Among these were a cancellation of the stock of the company and a reissue secured by a trust deed, of which Stephen T. Gage became the only surviving trustee, an issue of bonds, the trust deed to the Union Trust Company, leases to the Southern Pacific Company and the final control by that company through stock ownership of all of the properties and land grants. That company thereafter administered the land grants. These transactions were alleged as breaches of the conditions which, it is contended, were constituted by the provisos in the respective acts given above, providing for the sale of the granted lands to actual settlers.

163,430.28 acres of the granted lands were sold by the Oregon & California Railroad Company prior to May 12, 1887, nearly all of which were sold to actual settlers, in small quantities, although in a few instances the quantities exceeded 160 acres to one purchaser and the prices were slightly in excess of \$2.50 an acre. A rapidly increasing demand for the lands in large quantities and at

increased prices commenced about 1889 or 1890 and has continued ever since. From 1894 to 1903 some of the granted lands were sold to persons not actual settlers in quantities and at prices exceeding the maximum designated in the provisos, and in several instances in quantities of from 1,000 to 20,000 acres to one purchaser at prices ranging from \$5 to \$40 an acre—and in one instance a sale of 45,000 acres at \$7 an acre to a single purchaser. About 5,306 sales were made, aggregating 820,000 acres, of which sales about 4,930 were for quantities not exceeding 160 acres and 376 sales in quantities exceeding 160 acres to one purchaser, aggregating 524,000 acres. The latter sales were to persons other than actual settlers and for other purposes than settlement and at prices in excess of \$2.50 an acre; and approximately 478,000 acres were sold since 1897 and approximately 370,000 of the 524,000 were sold to 38 purchasers in quantities exceeding 2,000 acres to each purchaser. Approximately three-fourths of all sales made since 1897 were made by contracts providing for the payment of the purchase price in from five to ten annual payments and execution of conveyance upon final payment, a considerable number of which contracts were pending when this suit was brought.

On January 1, 1903, the company withdrew from sale all of its lands and refused to accept offers for any of them, asserting that they were timber lands and unsuitable for settlement. At the time the answer was filed there remained unsold 2,360,492.81 acres, of which 2,075,616.45 acres were theretofore patented under the land grant acts, and 284,876.36 at that time remained un-

patented, all of which are claimed by the company under the land grants.

Since January, 1903, over 4,000 persons have applied to purchase certain of the unsold lands, claiming that they desired to do so for the purpose of settling and establishing homes thereon and each applicant stated that he was willing and able to tender at the rate of \$2.50 per acre therefor. Until about the year 1890 or 1891 there was substantially no demand for the granted lands except for the purpose of settlement, and nearly all of the sales prior to the year 1894 were made for settlement and to settlers.

Prior to 1894 the company maintained an immigration bureau to induce settlement upon the lands, and the greater part of the sales made after that year were to persons not settlers and for prices exceeding \$2.50 per acre.

It was testified that the gross amount of lands that inured to the Oregon & California Railroad Company under both the East Side and the West Side grants was 3,182,169.57 acres, and it was stipulated that between the years 1871 and 1906 there were patented under the East Side grant 2,745,786.68 acres and between the years 1895 and 1903 there were patented under the West Side grant 128,618.13 acres, leaving unpatented 307,764.76 acres.

At the time the answer was filed there remained unsold of the granted lands 2,360,492.81 acres, of which 2,075,616.45 acres were theretofore patented to the Oregon & California Railroad Company under the land

grants and 284,876.36 thereof at that time remained unpatented, all of which unsold lands are claimed by the railroad company under and by virtue of the grants. The reasonable value of said unsold lands exceed the sum of \$30,000,000. There is a table attached to the answer showing the net amount received by the railroad company to be, after all disbursements, \$2,495,094.03. (The bill, as we have seen and shall presently more at length refer to, prays a forfeiture of the unsold lands only.)

Pursuant to the rules and regulations of the Interior Department, all of the patents were issued to and based upon applications in writing therefor from time to time filed in the appropriate land office of the United States by the Oregon & California Railroad Company as the "successor and assign" of the East Side Company and the West Side Company, respectively. Each application was accompanied by an affidavit which alleged, among other things, the following: "The said lands are vacant, unappropriated, are not interdicted mineral, nor reserved lands, and are of the character contemplated by the granting act" under which the patents were applied for.

The stipulation sets out the creation of an Auditor of Railroad Accounts, and subsequently the creation of a Commissioner of Railroads, and his duties by various acts of Congress until 1904, when the bureau was terminated and the duties, files and records thereof were transferred to the Secretary of the Interior, and that from 1879 to and including 1903 reports were made of the transactions of the Land Department of the Ore-

gon & California Railroad Company upon blanks furnished by such bureau. The details of the reports are given, which show many sales of the lands in excess of \$2.50 per acre.

The bureau, it is stipulated, made annual reports to the Secretary of the Interior which were embodied in his annual reports to the President and by the President forwarded to Congress, where they were referred to appropriate committees and printed as executive documents.

These reports show the administration of the grants by the company, the number of acres received under the grants, the number sold and at what prices, some of which exceeded \$2.50 per acre, and that the price asked for lands not sold was in excess of that sum per acre.

After stating the case as above, MR. JUSTICE McKENNA delivered the opinion of the Court.

A direct and simple description of the case would seem to be that it presents for judgment a few provisions in two acts of Congress which neither of themselves nor from the context demand much effort of interpretation or construction. But the case has never been considered as having that simple directness. A bill which occupies 78 pages of the record (exclusive of exhibits), the allegations of which are iterated and reiterated by cross complainants and interveners and added to, and an answer that admitted or traversed their averments with equal volume and circumstance, constituted the case for trial. Seventeen volumes of testimony, each of many

pages, were deemed necessary to sustain the case as made. It is certain, therefore, that no averment has been omitted from the pleadings; no fact from the testimony that has any bearing on the case; the industry of counsel has neglected no statute or citation, and their ability no comment or reason that can elucidate or persuade. As we proceed it will be seen that we have rejected some contentions. It is not the fault of counsel if we have misunderstood them.

Yet, with all the research, it may be on account of it, the contestants have not preserved an exact alignment and have shown no preference as to the company in which contentions are made or opposed.

The Government contends that the provisos, we so designate them and shall so refer to them, though they differ in technical language, constitute conditions subsequent and that by the alleged breaches indicated the lands became forfeited to the United States. The railroad company and other defendants contend that the provisos constitute restrictive and unenforceable covenants. The cross complainants insist that a trust was created for actual settlers and the interveners urge that the trust has the broader scope of including all persons who desire to make actual settlement upon the lands.

This curious situation is presented: The Government joins with the railroad in opposing the contentions of the cross complainants and interveners. Both of the latter unite with the Government in contesting the position of the railroad but join with the railroad against the Government's assertion of forfeiture. The cross

complainants attack the claim of the interveners, and the State of Oregon, through its Attorney General, without definitely taking sides in the controversies, declares it to be to the interest of the State and expresses the hope that the lands now withdrawn by the railroad shall be "subject to settlement and improvement as contemplated by the provisions of the grant, in order that these vast areas of the State may be improved, but also that the lands may not be withdrawn from taxation, thus depriving the State, and especially the eighteen counties in which they are situated, of a large proportion of their resources from direct taxation." The interest and hope expressed seem like a prayer against the Government's contention.

There is something more in these opposing contentions than a wrangle or medley of interests, and we are admonished that the words of the provisos, simple and direct as they are of themselves, take on, when they come to be applied, ambiguous and disputable meaning. It may be said at the outset that if ambiguity exists there may be argument in it against some of the contentions.

However, without anticipating, let us consider the provisos, and we repeat them to have them immediately under our eyes. The first is contained in the act of April 10, 1869. That act was expressed to be an amendment of the act of 1866 and to relieve from the effect of the expiration of the time for filing assent to the act of 1866 and to give "such filing of assent, if done within one year from the passage of the" amending act, the same force and effect to all intents and purposes as if it had been filed within one year after the passage of the act of 1866.

Then came this proviso, which was preceded by another not necessary to quote: "*And provided further, That the lands granted by the act aforesaid shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre.*"

The act of May 4, 1870, making the grant to the West Side Company, provides in section 4 that the lands granted, excepting only such as are necessary for depots and other needful uses in operating the road, "shall be sold by the company to actual settlers," the quantities and the price being designated as in the act of 1869.

These, then, are the provisos which are submitted for construction. The contention of the Government is as we have seen, and it lies at the foundation of its assertion of forfeiture of the grant, that they constitute conditions subsequent.

The argument to support the contention is based first on the general considerations that experience had demonstrated to the country the evils of unrestricted grants, and that the bounty of Congress had been perverted into a means of enriching "a few financial adventurers," and that lands granted for national purposes "were disposed of in large blocks to speculators as well as to development companies organized by officers of the railroad companies." Informed by such experience, in substance is the contention, and solicited by petition and moved by the reasoning of some of its members, Congress changed its policy of unqualified bounty, and, while not refusing to contribute to the aid of great enterprises, sought to

prevent the perversion of such aid to selfish and personal ends, and to promote the development of the country by the disposition to actual settlers of the lands granted. And, it is insisted, efficient means were adopted to secure the purpose by making the provisos conditions subsequent, with the sanction of forfeiture for violation.

These general considerations are supplemented by a special and technical argument. The provisos and their context, it is said, show the general characteristics of conditions, that is, they make the estate granted and its continuance to depend upon the doing of something by the grantee, and that the proviso in the act of 1869 is expressed in apt and technical words, by the use of which, it is further contended, it is established by authority that an estate upon condition is necessarily created. Cases are cited, and the following is quoted from page 121 of Sheppard's Touchstone: "That for the most part conditions have conditional words in their frontispiece and do begin therewith; and that amongst these words there are three words that are most proper, which in and of their own nature and efficacy, without any addition of other words of re-entry, in the conclusion of the condition, do make the estate conditional, as *proviso, ita quod, and sub conditione*. . . . But there are other words, as *si, si contingat*, and the like, that will make an estate conditional also, but then they must have other words joined with them and added to them in the close of the condition, as that then the grantor shall reenter, or that then the estate shall be void, or the like." And words of such determining effect, it is urged, introduce and give meaning to the proviso in the amendatory act of 1869.

But it will be observed there are no such controlling words in the provision for the sale to actual settlers in the act of May 4, 1870, that is, in the grant to the West Side Company; and the Government is confronted by the rule which it quotes, that in such cases there must be "words of reentry" or a declaration "that then the estate shall be void, or the like." The Government, therefore, varies and relaxes the rule it invokes and admits that the sense of a law or terms of an instrument may be found in other words than the quoted technical ones if the intention is made clear.

It is not necessary to review the cases cited respectively to sustain and oppose the contending arguments. The principles announced in the cases are rudimentary and may be assumed to be known and the final test of their application to be the intention of the grantor.

These principles will be kept in mind in our consideration of the acts of Congress involved, and, besides, that there may be a difference in rigor between public and private grants and that this court has especially said that railroad land grants have the command and necessarily, therefore, the effect of law.

The Government reinforces its contention, as we have seen, with what it considers a change of policy in legislation and in effect insists that restrictions upon the disposition of the lands granted became more dominant in purpose than the building of the roads, to aid which it was admitted the lands were necessary. The argument is hard to handle, as indeed are all arguments which attempt to assign the exact or relative inducements to conjoint pur-

poses. In the first grants to railroads there were no restrictions upon the disposition of the lands. They were given as aids to enterprises of great magnitude and uncertain success and which might not have succeeded under a restrictive or qualified aid. However, a change of times and conditions brought a change in policy, and while there was a definite and distinct purpose to aid the building of other railroads, there was also the purpose to restrict the sale of the granted lands to actual settlers. These purposes should be kept in mind and in their proper relation and subordination.

We shall be led into error if we conclude that because the railroad is attained it was from the beginning an assured success, and that it was a secondary and not a primary purpose of the acts of Congress. There is much in the argument of the defendants that the aid to the company was part of the national purpose, which this court has said induced the grants to the transcontinental railroads (91 U. S. 79; 99 U. S. 48; *United States v. Sanford*, 161 U. S. 412). And we may say that the policy was justified by success. Empire was given a path westward and prosperous commonwealths took the place of a wilderness.

But such success had not been achieved when the grant of 1866 was made nor in full measure when the acts of 1869 and 1870 were passed, and it may be conceded that they were intended to continue and complete such national purpose, and that it was of the first consideration, but the secondary purpose was regarded and provided for in the provisos under review. Both pur-

poses must be considered. It may be that it was not expected that actual settlers would crowd into "the vast unpeopled territory," but the existence of such settlers at some time must have been contemplated. Both purposes, we repeat, were to be subserved, and how to be subserved is the problem of the case.

There is certainly a first impression against a forfeiture being the solution of the problem or that there was a necessity for it. A forfeiture of the grant might have been the destruction of the enterprise, and settlement postponed or made impossible to any useful extent by the inaccessibility of the lands. And forfeiture was besides beset with many practical difficulties as a remedy. When, indeed, would it be incurred? The obligation of the provisos and the remedy for their breach were coincident. The refusal of the demand of the first actual settler (if there could be such without the consent of the railroad) or of the first applicant for settlement would subvert the scheme of the acts of Congress. It cannot be that the grants were intended to be so dependent and precarious and the enterprises so menaced with peril and, it might be, brought to disaster.

Are the contingencies fanciful? Such character may be asserted of any conjecture of what might have occurred but which did not, and yet to construe a statute we must realize its inducements and aims, solving disputes about them by a consideration of what might accomplish or defeat such aims. The acts under review conferred rights as well as imposed obligations, and it could not have been intended that the latter should be so

enforced as to defeat the former. We have given an instance of how this might be done by regarding the provisos as conditions subsequent. Another instance may be given. In its argument at bar the Government insisted that it was the duty of the railroad company to have provided the machinery for settlement and, by optional sales, guarded by probational occupation of the lands, to demonstrate not only initial but the continued good faith of settlers, and that the omission to do so was of itself a breach of the provisos and incurred a forfeiture of the grants. But when did such obligation attach? Before or after the construction of the road—construction in sections or completely? The contention encounters the Government's admission that there was no obligation imposed upon the railroad to sell. And we have the curious situation (which is made something of by cross complainants and interveners in opposition to the Government's contention) of the right of settlers to buy but no obligation on the railroad to sell, and yet a duty of providing for sales under an extreme and drastic penalty. We may repeat the question, Might not such consequences have ended the enterprise, making it and its great purpose subordinate to local settlement? Indeed, might not both have been defeated by the inversion of their purposes.

The omission to institute a plan of settlement and sale is not alleged in the bill as a breach of the provisos. The first breach alleged is the trust deed to Stephen T. Gage, and the next the trust deed to the Union Trust Company. But these deeds manifestly were but forms of security, even if they went too far and were not bind-

ing to the extent of their excess. The Government admits that the grants were intended to be used as a basis of credit; and we have argument again against a forfeiture by the dilemma to which the railroad might be brought in its attempt to comply with all the provisions of the act as well as with the provisos. If it failed to complete the road within the time required the granting act was to become "null and void," (upon which we shall presently comment). If it made efforts to complete the road by using the grants as a means of credit it might forfeit them.

But there is a better argument than what may be deduced from the solution of perplexing difficulties or the conjecture of possible contingencies. It will be observed that there was an explicit provision in the act of 1866 that upon the failure of the companies to file assent to the act and to complete the road as and within the time required, the act should "be null and void" and the lands not patented at the time of such failure should "revert to the United States." And it was provided that if the road should not be "kept in repair and fit for use", Congress by legislation might put the same in that condition and repay its expenditures from the road's income or fix pecuniary responsibility upon the company not exceeding the value of the lands granted.

Congress, therefore, had under consideration remedies for violations of the provisions of the act and adjusted them according to what it considered the exigency. As a penalty for not completing the road as prescribed Congress declared only for a reversion of

the lands *not then patented*; for not maintaining it in repair and use Congress reserved the right temporarily to sequester the road; and yet for a violation of the provision for sale to settlers it is urged that Congress condemned to forfeiture not only the lands then *unpatented but those patented*. Mark the difference. Was non-completion of the road of less consequence than settlement along its line?—not necessarily complete settlement, but any settlement—the refusal, it might be, of the acceptance of a single offer of settlement or even, as it is contended, of making provision for settlement, being of greater consequence and denounced by more severe penalty than the declared conditions, that is, assent to the act, completion of the road, and its maintenance. This is difficult, if not impossible to believe.

It appears, therefore, that the acts of Congress have no such certainty as to establish forfeiture of the grants as their sanction, nor necessity for it to secure the accomplishment of their purposes,—either of the construction of the road or sale to actual settlers—and we think the principle must govern that conditions subsequent are not favored but are always strictly construed, and where there are doubts whether a clause be a covenant or condition the courts will incline against the latter construction; indeed, always construe clauses in deeds as covenants rather than as conditions, if it is possible to do so. 2 Washburn on Real Property, 4. And this because “they are clauses of contingency on the happening of which the estates granted may be defeated.” And it is a general principle that a court of equity is reluctant

to (some authorities say never will) lend its aid to enforce a forfeiture.

By this conclusion do we leave the provisos meaningless and the Government without remedy for their violation? There is no argument in a negative answer. From the defects of a provision we can deduce nothing nor on account of them substitute one of greater efficacy.

But must the answer be in the negative, and by rejecting the contention of the Government are we compelled to accept that of the railroad company?—or we may say those of the railroad company, for the contentions are many, some of which preclude the application of the provisos, some of which assert their invalidity and others limit their application.

If not first in order, at least in more immediate connection with the contention of the Government is the contention that the provisos are not conditions subsequent but simple covenants, and, it is said, restrictive and negative only, and therefore not enforceable. In support of the contention all of the uncertainties or asserted uncertainties of the provisos are marshaled and amplified. We can only enumerate them. There is uncertainty, it is asserted, in the legal measure of duty, therefore of its performance—for whom to be performed and when; nor is the time or condition of settlement prescribed, whether by the standard of the homestead or preemption laws; nor by what test or by what tribunal contests between applicants to purchase are to be determined; no compulsion of sale at any time, to any person, in any

quantity; no mutuality in the covenant; no assurance that settlers will apply, and no obligation assumed by them. And the conclusion is deduced that the actual settlers clauses, viewed even as covenants, were either impossible of performance or repugnant to the grants, and, therefore, void.

The arrangement seems very formidable, but is it not entirely artificial? It is stipulated that prior to 1887 more than 163,000 acres of the granted lands were sold, nearly all of which were sold to actual settlers, in small quantities. If the sale of 163,000 acres of land encountered no obstacle in the enumerated uncertainties we cannot be impressed with their power to obstruct the sale of the balance of the lands. The demonstration of the example would seem to need no addition. But passing the example, as it may be contended to have some explanation in the character of the lands so disposed of, the deduction from the asserted uncertainties is met and overcome by the provisos and their explicit direction. They are, it is true, cast in language of limitation and prohibition; the sales are to be made only to certain persons and not exceeding a specified maximum in quantities and prices. If the language may be said not to impose "an affirmative obligation to people the country" it certainly imposes an obligation not to violate the limitations and prohibitions when sales were made, and it is the concession of one of the briefs that the obligation is enforceable, and that, even regarding the covenant as restrictive, the "jurisdiction of a court of equity, upon a breach or threatened breach of the covenant, to enforce performance by enjoining a viola-

tion of the covenant cannot be doubted." Apposite cases are cited to sustain the admission, and in answer to the contention of the Government that it could recover no damages for the breach and hence had no enforceable remedy but forfeiture, it is said: "But the jurisdiction of a court of equity in such cases does not depend upon the showing of damage. Indeed, the very fact that injury is of public character and such that no damage could be calculated, is an added reason for the intervention of equity." And cases are adduced. We concur in the reasoning and give it greater breadth in the case at bar than counsel do. They would confine it, or seem to do so, to the compulsion of sales of land susceptible of actual settlement, and assert that the evidence established that not all of the lands, nor indeed the greater part of them, have such susceptibility. But neither the provisos nor the other parts of the granting acts make a distinction between the lands, and we are unable to do so. The language of the grants and of the limitations upon them is general. We cannot attach exceptions to it. The evil of an attempt is manifest. The grants must be taken as they were given. Assent to them was required and made, and we cannot import a different measure of the requirement and the assent than the language of the act expresses. It is to be remembered the acts are laws as well as grants and must be given the exactness of laws.

If the provisos were ignorantly adopted as they are asserted to have been; if the actual conditions were unknown, as is asserted; if but little of the land was arable, most of it covered with timber and valuable only

for timber and not fit for the acquisition of homes; if a great deal of it was nothing but a wilderness of mountain and rock and forest; if its character was given evidence by the application of the Timber & Stone Act to the reserved lands; if settlers neither crowded before nor crowded after the railroad, nor could do so; if the grants were not as valuable for sale or credit as they were supposed to have been and difficulties beset both uses, the remedy was obvious. Granting the obstacles and infirmities, they were but promptings and reasons for an appeal to Congress to relax the law; they were neither cause nor justification for violating it. Besides, we may say that there is controversy about all of the asserted facts and conclusions.

Our conclusions, then, on the contentions of the Government and the railroad company are that the provisos are not conditions subsequent; that they are covenants, and enforceable; and we pass to the other contentions of the company.

It is contended (1) that Congress was without lawful authority on April 10, 1869, to annex a new condition, by amendment or otherwise, to the grant made by the act of 1866 as amended by the act of June 25, 1868 (the latter extended the time to complete the first and subsequent sections of the road and the completion of the whole road). We do not think it is necessary to follow the involutions of the argument by which the contention is attempted to be supported. It is asserted that the California & Oregon Railroad Company filed its assent within one year and completed the first sec-

tion of twenty miles within two years after the passage of the act of July 25, 1866, and that the Oregon Central Railroad Company (East Side Company) was not in default on April 10, 1869. The assertions come very late. Had they been made at that early time, questions would have been presented whose solution we need not conjecture. The West Side Company preceded the East Side Company and on October 10, 1866, received the designation from the Oregon legislature as the road entitled to receive the grant of 1866. The East Side Company started its existence on April 22, 1867, and in 1868 attacked the legality of the incorporation of the other company and procured the revocation of the designation of that company and the designation of itself by the legislature. The controversy for precedence and rights continued. It was carried to Congress, and the act of April 10, 1869, was passed. Subsequently came compromises and the act of May 4, 1870. By the latter act and in acceptance of its grant and provisions, the West Side Company took the west side of the Willamette River. The East Side Company took the east side of the river and on June 8, 1869, by resolution, accepted the provisions of the act of 1866 "and of all acts amendatory thereof, and upon conditions therein specified, and do hereby give our assent and the assent of such company thereto." It was not then thought, as it is now asserted, that the act of 1869 annexed new and invalid conditions, nor was there such assertion afterwards. The East Side Company, on March 29, 1870, assigned its rights under the act of 1866 *and the acts amendatory thereof and supplemental thereto* to the present company, the Oregon & California Railroad

Company, and then dissolved. The Oregon & California Railroad Company, accepted the transfer and by resolution accepted the act of 1866 and amendments thereto and "all the benefits and emoluments therein and thereof granted, and upon the terms and conditions therein specified", and authorized the assent to be filed in the office of the Secretary of the Interior.

It is too late to declare such formal and repeated action to have been unnecessary. Every advantage was obtained, and while enjoying the benefit of it the obligations of it cannot be denied. Had there been an assertion of rights against the act of 1869 and had there been an immediate rejection of its provisions and obligations, the questions in the present case would not now be submitted for solution. It is possible to suppose that no patents to lands would have been issued, or at any rate the Government's attention would have been challenged to the assertion of rights which it might have contested from a position of supreme advantage.

(2) It is contended that if sales were made under the limitations of the provisos the breaches were acquiesced in, and for this the action and knowledge of the officers of the Government are adduced—indeed, the knowledge of Congress itself; and reciting what was done under the grants, counsel say: "It is a story of mortgages and sales, executory contracts and conveyances, and a stream of Government patents flowing in between. These things were known of all; they were matters of common knowledge, notoriety of public record; the railroad knew them; the people knew

them, the Government knew them." And cases are cited which, it is contended, establish that such circumstances might work an estoppel even against the Government, which, when it appears in court, it is contended, is bound like other suitors, and certainly establish that for more than forty years in the view of the executive officers the provisos were not conditions subsequent. Granting their strength in that regard, granting they have some strength in every regard, they have not controlling force, considering the provisos as simple covenants. And they cannot be asserted as an estoppel. No one was deceived, at least no one should have been deceived; no action was or should have been induced by them that could plead ignorance of the provisions and immunity from their responsibility. The recited conduct had explanation and notice in the opinions of the Department of the Interior. They are entirely consistent with the belief expressed by Mr. Ballinger, then Commissioner, afterwards Secretary of the Interior, that their enforcement was a matter for the courts, not for executive or legislative action.

Mr. Ballinger, in a communication to a member of the House of Representatives, expressed the view that "as soon as the title vested in the company (and it was his view that it had vested by the construction of the railroad), jurisdiction over the lands passed from the executive branch of the Government, and the enforcement of the provision (the sale of lands to actual settlers) rests with the courts, through appropriate action by either the settlers entitled to purchase or by the Government, acting through the Department of Justice."

And a doubt was expressed of the power of Congress to compel compliance with the provision. This was the position of the Department in 1907. It was not new or sudden. It was the repetition of the declaration of a much earlier time.

In an early day of the grant—1872—a communication was addressed by the then Attorney General to the Commissioner of the Land Office, accompanied by a letter from the president of the European & Oregon Land Company (this company was made a trustee of the lands granted under the acts of 1866 and 1869 to secure a bond issue of the company,) in which it was stated that the board of trustees of the company, in accordance with a legal opinion given to it, had ordered that persons who had become *actual settlers* between July 25, 1866, and April 10, 1869, should have the privilege of purchasing according to the proviso, “but as to *all others* the company was not legally restricted from selling on liberal terms, for cash or credit, at reasonable rates.” A request was made for an approval of the construction, and that the company be authorized “to sell on such terms as may be reasonable and just to all parties without any restrictions.” This letter was submitted to the then Secretary of the Interior, Mr. Delano, who replied “that the proviso *means just what it says*”, “‘that the lands be sold to actual settlers only’” in the designated quantities and for the designated prices; that the legislative intention was plainly to prevent the lands being held for speculative prices or disposed of to others than actual settlers, and that to construe the pro-

viso as requested would in his "judgment utterly defeat such intention."

It being objected that the case was not submitted for decision or opinion, the Secretary replied that it was so regarded and that the opinion could not be formally withdrawn. He, however, expressed his willingness at any time on application to reopen the case and to hear all arguments which the company might desire to present. The opportunity was never taken advantage of, but the company proceeded upon its own construction of the proviso.

These views explain the attitude of the Department and give different color and meaning to its action than those assigned to it by the railroad company, and if the company disagreed with or defied the Department it cannot claim to have been deceived. The views of the Department were no doubt the views of Congress, and its action and reluctance to prejudge are exhibited in the resolution of April 30, 1908, under which this suit was brought. It refused, as we have seen, to determine peremptorily the rights of the United States or to anticipate judicial action.

We may observe again that the acts of Congress are laws as well as grants and have the constancy of laws as well as their command and are operative and obligatory until repealed. This comment applies to and answers all the other contentions of the railroad company based on waiver, acquiescence and estoppel and even to the defenses of laches and the statute of limitations. The laws which are urged as giving such defenses

and as taking away or modifying the remedies under review have no application. It would extend this opinion too much to enter upon their discussion.

A word of comment may be made upon one of the acts adduced as constituting a waiver of the breaches of the covenants, that is, upon the act passed August 20, 1912, (c. 311, §7 Stat. 320), it being supplemental to the joint resolution of April 30, 1908, *supra*. It was passed after this suit was commenced and brought forward with the other acts by an amendment to the answer. Counsel assert of it substantially as alleged in the answer that it "is a recognition of the non-settlement character of the lands involved, and that such lands, at the time they were sold to the so-called innocent purchasers described in forty-five suits brought by the United States against said purchasers and these defendants in this court, are unfit for settlement and were so unfit for settlement and could not be sold to actual settlers at the time they were sold by the company to such purchasers."

We have answered the contention so far as it depends upon the character of the lands. The character of the lands furnished no excuse. It might have justified non-action, but it did not justify antagonistic action. Moreover the act, while it authorized compromises with purchasers from the company, explicitly excluded the application of the provision to lands in the present suit and declared that it should create no "rights or privileges whatever in favor of any of the defendants therein" and that nothing in the act should condone any

of the breaches of the conditions or provisions of the granting acts nor be a waiver of any cause of action or remedy of the United States on account of any such breach or breaches or of any right or remedy existing in favor of the United States.*

With the provisos as conditions subsequent out of the way the suit remains one to enforce a continuing covenant. It is not a suit to vacate and annul patents.

(3) There is a special contention, given the pretension of a separate brief, that the "Sinking Fund Act of Congress of May 7, 1878, ratified the transfer of the California & Oregon Railroad and its land in California to the Central Pacific Company, and operated to abrogate the 'Settlers Clause' contained in the acts of April 10, 1869, and May 4, 1870." The argument to support the contention is that the Central Pacific Railroad Company became, with the consent of Congress, the owner of the California & Oregon Railroad (to avoid confusion this company must be kept distinct from the defendant Oregon & California Railroad) in 1870, and that after such transfer and date it became impossible for the

* "Sec. 6. That nothing in this act contained, nor action taken pursuant to the provisions of this Act, shall be construed as a condonation of any of the breaches of any of the conditions or provisions annexed to any of the grants designated in said joint resolution approved April thirtieth, nineteen hundred and eight, nor as a waiver of any of said conditions or provisions, nor as a waiver of any right of forfeiture in favor of the United States on account of any breach or breaches of any of said conditions, nor as a waiver of any cause of action or remedy of the United States on account of any breach or breaches of any said conditions or provisions, nor as a waiver of any other rights or remedies existing in favor of the United States."

latter company to sell the lands for the prescribed price, or for any other price, or to settlers in any quantities, "for the reason that the company had parted with its title to the entire grant, and this was recognized, approved and validated by the United States." The contention seems to be directed more to the settlers' clause viewed as a condition subsequent than to it considered as a covenant. It is, however, said that the clause "has been entirely abrogated by said legislation and the acts of the Government." We are not impressed by the contention. It seems to be a tardy claim in the case and is the dare of an extreme ingenuity against the admissions and averments of the answers and many assertions which the record contains of ownership of and dominion over the lands by the Oregon and California Company and of their disposition by it. Indeed, it is opposed to the whole scheme of the suit and the defenses to it and to the stipulation of the parties. It there appears that after the designated date patents were applied for and issued to the Oregon & California Railroad Company, defendant herein, for 323,078.68 acres of land, over 163,000 acres of which were sold by that company to actual settlers. Indeed, all of the activities in the administration of the grants were those of the Oregon & California Railroad. It made contracts and executed deeds for particular parcels; it made trust deeds for the whole of them; it went into receivership and emerged from it to resume its activities, and made the reports to Congress upon which it bases the acquiescence of the Government in the breaches of the provisos.

It is true that there appears in the stipulation the confusion of a statement that there was an amalgama-

tion and consolidation of the Central Pacific, Western Pacific and Oregon Central Railroad Companies into the Central Pacific Company and that at the time the articles of amalgamation and consolidation were filed (June 23, 1870) the California & Oregon Railroad Company "was the owner of all unsold lands in California" granted by the act of July 25, 1866; that from the date of filing such articles of amalgamation and consolidation the Central Pacific Railroad Company remained owner of all of the lands granted by the act of 1866 and two other acts which made grants to the latter company until 1899, when what remained unsold of the lands were granted to the Central Pacific Railway. But it is stipulated that the statements "concerning the ownership and conveyance of the lands granted by said acts of Congress are made subject to the terms and provisions of said acts of Congress respectively, and all rights of the United States thereunder—the title to said lands not being an issue in the suit at bar." Why these facts were stipulated it is hard to guess, but it is certain they cannot be given effect against all other facts stipulated. It will be observed the stipulation is concerned only with the California & Oregon Railroad, not with the defendant Oregon & California Railroad. The explanation of the Government is, therefore, correct that the Oregon part of the grant was by the grant itself treated as substantially distinct from the California part and that the Oregon part has always been claimed, used and enjoyed by defendant, the Oregon & California Railroad Company or its predecessors in title, and never by the Central Pacific.

The provisos of the acts having been thus established as covenants, not conditions subsequent, between the Government and the defendants, and their continuing obligation determined, we are brought to the consideration of the rights of the cross complainants and interveners thereunder.

It may be said that in some of the aspects of our discussion there was implication against their contentions, but it also may be said there is implication for them. Undoubtedly the provisos expressed the policy of the settlement of the lands and a sale to settlers, but the cross complainants and interveners assert a right more definite—a trust, indeed, and personal—of compulsory obligation upon the railroad company, to be enforced in individual suits.

Snyder and 63 others, alleging themselves to be *actual* settlers upon specified lands, brought suits nearly a year before the present suit was commenced. They were brought into this suit and are now here as cross complainants. They pray that the grants be declared to be grants in trust and ask for protection, “whatever form of decree may be entered.” They further ask “that receivers or trustees be appointed, whose duty it shall be to formulate, with the approval of the District Court, suitable rules and regulations for the sale of all the lands here involved, in accordance with the acts of Congress making the grants.” They deny having anything in common with the interveners, and, as we have seen, vigorously attack the claim of the Government for a forfeiture of the grants.

The interveners concur with the cross complainants that the acts created a trust but assert that they have a broader extent. In other words, and as their counsel express it, the intention of Congress was to create a trust in the granted lands for the benefit of those who might desire to acquire title thereto, that is, not actual settlement was the condition of purchase, but an intention to settle, with the qualification to do so.

Here, then, is a conflict between the asserted beneficiaries of the asserted trust—whether *actual* settlers, as cross complainants contend, or *applicants* for settlement, as the interveners insist. The distinction would seem to be real and cannot be confounded. The word “actual” expresses a settlement completed, not simply contemplated or possible. Upon the express words of the provisos it would seem that interveners’ claims to be beneficiaries of the trust, if there is a trust, must be refuted.

The cross complainants present arguments of more difficulty, supported by appealing considerations. “Actual settlers” are the words of the provisos, and we may assume actual settlers were contemplated and sales of the lands were restricted to them; but how were actual settlers to be ascertained, and by whom? And was there a compulsion or option as to sales? There could not be an absolute right to settle or purchase unless there was an absolute compulsion to sell. The acts of Congress omit regulation. Their language is not directive; it is restrictive only. With this exception the grant is unqualified. The lands were granted

to aid in the construction of the road, and while it is a certain inference that disposition of them was contemplated, necessarily there was conferred a discretion as to time. There was certainly no limitation of it expressed.

The contending considerations we have already stated and their respective weights, and decision must necessarily turn upon a judgment of the purposes of the granting acts, and in what manner they were intended to be accomplished, not of the provisos alone. There is plausibility in the argument which represents that if the provisos be held to give to the railroad a discretion of sale, the choice of time and settlers, their requirement is impotent, and instead of securing settlement would prevent it; instead of devoting the lands to development, retain them in monopoly and a kind of mortmain.

We feel the strength of the argument but cannot yield to it. There are countervailing ones. We have already indicated that nothing can be deduced from the imperfections of the granting acts. Indeed, the argument of cross complainants, like a great many other contentions in the case get their plausibility from the abuses of the granting acts, not their uses. We have seen that in the early days of the grants settlements were normally made and the railroad, in the exercise of its discretion, responded to such settlement by sales to settlers.

There was no embarrassment then in the selection of settlers and no question by anybody that there was a discretion of sale on the part of the railroad company.

A denial came later and the assertion of a peremptory right against the company of settlement and purchase, both to be acquired by an intrusion upon the company's possession, if it can be said to have had possession. Of course, the delay in the assertion of a right is not conclusive against its existence. There is, however, argument in it, and if it may be said that settlers were not in such numbers and urgency as to bring their rights to attention and assertion, a conjecture may be engendered that some other purpose than the acquisition of homes has led to a denial of rights which no one theretofore had questioned. It is asserted that not a desire of settlement but the rise in the price of lumber has created an eager demand for the lands.

There are, however, further considerations. By the acts of 1866 and 1870 it is provided that upon the survey and location of the roads the Government shall withdraw from sale the granted lands, and the provision would seem to withdraw the lands from the specific operation of the land laws and certainly from a complete analogy to them. The public land laws had test of the qualification of settlers under them; they had also the machinery of proof and precaution. When the granted lands were withdrawn from those laws and primarily devoted to another purpose they were committed to another power, to be administered for such purpose, and a discretion in the exercise of the power, within the restriction imposed, was necessarily conferred. This purpose we have sufficiently estimated. Nor need we pause to consider the differences between charitable trusts and other trusts, the class, not individual interest, which the

former must have, as it is contended, and the certainty in the beneficiaries which the cases have assigned to the latter. And certainly the words "actual settlers" indicate no particular individuals. They describe a class or body of individuals without habitation or name. As Judge Wolverton, in his opinion in the District Court (186 Fed. Rep. 861, 910), said: "There could be no actual settler until an actual habitation was established upon some specific parcel of this land. Logically, no one is a *cestui que trust* under the theory until and unless he becomes such a settler. This is a palpable demonstration of the uncertainty as to the beneficiary, for who, of the vast concourse of humanity, is going to come and claim the right and privilege of settling upon the land?" We cannot construe the grants as confined or encumbered by rights so indefinite.

There was a complete and absolute grant to the railroad company with power to sell, limited only as prescribed, and we agree with the Government that the company "might choose the actual settler; might sell for any price not exceeding \$2.50 an acre; might sell in quantities of 40, 60 or 100 acres, or any amount not exceeding 160 acres." And we add, it might choose the time for selling or its use of the grants as a means of credit, subject ultimately to the restrictions imposed; and we say "restrictions imposed" to reject the contention of the railroad company that an implication of the power to mortgage the lands carried a right to sell on foreclosure divested of the obligations of the provisos.

To use the grant for credit might become, indeed did become, a necessity. The construction of the road halted

for funds. They were raised by trust deeds, as we have seen. The accomplishment of the purpose of the grants determines, we repeat, against the creation of a trust.

In conclusion we cannot refrain from repeating that the case in its main principles is not in great compass. It has been given pretension and complexity by the happening of the unforeseen, the lapse of time, change of conditions and the contests of interests. These, however, are but accidents, giving perplexity and prolixity to discussion. Judgment is independent of them. It is determined by the simple words of the acts of Congress, not only regarded as grants but as laws and accepted as both; granting rights but imposing obligations—rights quite definite, obligations as much so. The first had the means of acquisition; the second, of performance; and, as we have pointed out, whatever the difficulties of performance, relief could have been applied for and, it might be, have been secured through an appeal to Congress. Certainly evasion of the laws or the defiance of them should not have been resorted to.

Nor can their obligation be magnified by looking backwards, by the results achieved rather than when they were only hoped for, by conditions of which there was not even prophecy.

We have seen that one company failed under the burdens which it assumed. The other company took it up and struggled for years under it and its own burden. It may, indeed, have finally succeeded by a disregard of the provisos. It might, however, have succeeded by a strict observance of them. We are not required to decide be-

tween the suppositions. We can only enforce the provisos as written, not relieve from them.

For the same reason we cannot at the instance of the Government give a greater sanction to them than Congress intended, nor give to cross complainants and interveners a right which the granting acts did not confer upon them.

Rejecting, then, the contention of the Government and the contentions of the cross complainants and interveners and regarding the settlers clauses as enforceable covenants, what shall be the judgment? A reversal of the decree of the District Court, of course, and clearly an injunction against further violations of the covenants. There certainly should be no repetition of them. What they were the record exhibits.

We need not comment on them or point out how opposed they were to the covenants, how antagonistic to the policy and purpose of the Government expressed in the covenants. The contrast of a sale to a single purchaser of 160 acres (the maximum amount) with a sale of 1000, 2000, 20,000 and 45,000 acres to a single purchaser needs no emphasis; nor the contrast of a use of the lands to establish homes with their use for immediate or speculative enterprises.

In view of such disregard of the covenants, and gain of illegal emolument, and in view of the Government's interest in the exact observance of them, it might seem that restriction upon the future conduct of the railroad company and its various agencies is imperfect relief; but the Government has not asked for more.

In its bill it has distinguished between the sold and unsold lands and between the respective rights and interest, vested, contingent or expectant, in them; and while it is asserted that all have become forfeited, only the unsold lands and the rights and interest in them are included in this suit. And the reason is given that the purchasers were many, the names and places of residence of only a few of them were known and the names of the others could not have been ascertained in time to make them parties to the suit. Besides, that such purchases and interests were made and acquired under greatly varying circumstances and that it would be inequitable to make a few purchasers representatives of all, and to make all parties would postpone and might ultimately defeat the public interests. That, therefore, this suit was brought, it is alleged, to determine the rights and remedies as to the unsold lands, and that subsequently other suits will be instituted as to the sold lands, rights and remedies as to them being in effect reserved.

Therefore, the decree in this suit shall be without prejudice to any other suits, rights or remedies which the Government may have by law or under the joint resolution of April 30, 1908, (Res. 18, 35 Stat. 571), or under the act of Congress passed August 20, 1912 (c, 311, 37 Stat. 320).

However, an injunction simply against future violation of the covenants, or, to put it another way, simply mandatory of their requirements, will not afford the measure of relief to which the facts of the case entitle the Government.

The Government alleged in its bill that more than 1000 persons had made application to purchase from the railroad company in conformity to the covenants. In answering the defendants averred that such applications were made by persons who desired to obtain title on account of the timber and not otherwise, and for the purpose of speculation only and not in good faith as actual settlers. And it was averred that the lands were chiefly and in most instances solely of value because of the timber thereon and were not fit for actual settlement. And, further, that the lands capable of actual settlement and the establishment of homes thereon at no time "exceeded (approximately) 300,000 acres, consisting of small and widely separated tracts, all of which were sold to actual settlers or persons claiming to be such during construction and prior to completion, respectively, of said railroads, in quantities of 160 acres or less to a single purchaser, at prices not exceeding \$2.50 per acre."

A great deal of testimony was introduced, consisting not only of that of witnesses but of maps, photographs, reports and publications, which tended to establish the asserted character of the lands. And there was evidence in rebuttal. We cannot pause to determine the relative probative force of the opposing testimonies. It is, however, clear, even from the Government's summary of the evidence, that lands which may be fit for cultivation have a greater value on account of the timber which is upon them. Besides, for our present purpose we may accept the assertion of defendants; and we have seen that Congress extended the Timber and Stone Act to the reserved lands, and, by the act of August 20, 1912, *supra*,

it has withdrawn from entry or the initiation of any right whatever under any of the public land laws of the United States the lands which might revert to the United States by reason of this suit.

This, then, being the situation resulting from conditions now existing, incident, it may be, to the prolonged disregard of the covenants by the railroad company, the lands invite now more to speculation than to settlement, and we think, therefore, that the railroad company should not only be enjoined from sales in violation of the covenants, but enjoined from any disposition of them whatever or of the timber thereon and from cutting or authorizing the cutting or removal of any of the timber thereon, until Congress shall have a reasonable opportunity to provide by legislation for their disposition in accordance with such policy as it may deem fitting under the circumstances and at the same time secure to the defendants all the value the granting acts conferred upon the railroads.

If Congress does not make such provision the defendants may apply to the District Court within a reasonable time, not less than six months, from the entry of the decree herein, for a modification of so much of the injunction herein ordered as enjoins any disposition of the lands and timber until Congress shall act, and the court in its discretion may modify the decree accordingly.

Decree reversed and cause remanded to the District Court for further proceedings in accordance with this opinion.

Mr. Justice McReynolds took no part in the *consideration* and decision of the case.

*In the District Court of the United States for the
District of Oregon, Ninth Circuit.*

No. 3340.

United States of America,

Complainant and Appellee.

v.

Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and Union Trust Company, individually and as trustee,

Defendants and Appellants.

CERTIFICATE OF THE CLERK OF THE
UNITED STATES DISTRICT COURT TO
THE TRANSCRIPT OF RECORD.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing printed pages, numbered from 1 to ~~165~~, inclusive, are a full, true, correct, and complete transcript of so much of the record, papers, and other proceedings in the above entitled suit as are, according to the praecipe of appellants and the stipulation of the parties herein, required and necessary for the hearing in the United States Circuit Court of Appeals, for the Ninth Circuit, on the appeal taken by defendants on January 8, 1916, from the judgment and decree entered in said District Court of the United States for the District of Oregon on the 9th day of December, 1915, in case num-

bered 3340, in equity, as the originals thereof appear of record and on file in said District Court at the city of Portland in said District; and that the same constitute the transcript of record on appeal herein from said decree of the District Court of the United States for the District of Oregon, entered on December 9, 1915, to the United States Circuit Court of Appeals for the Ninth Circuit.

And I further certify that pursuant to the stipulation of the parties appearing in the foregoing record and the order of court based upon said stipulation, I have attached to the foregoing transcript a copy of the opinion of the Supreme Court of the United States upon certificate from and Writ of Certiorari to the United States Circuit Court of Appeals, for the Ninth Circuit, in this cause, and that said copy of opinion has been compared by me with the opinion of said Supreme Court as the same appears in Volume 238, page 393, of the United States Supreme Court Reports, and is a true and complete transcript of the said opinion as the same appears in said Reports.

And I further certify that the cost of the foregoing transcript is \$ ~~6.00~~ for clerk's fees for preparing the said transcript, and \$ ~~159.26~~ for printing said transcript, and that the same has been paid by said appellants.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Portland, Oregon, this 1st day of March, 1916.

John A. Marsh
Clerk of the District Court of the United States for the District of Oregon.

(Seal)
LRS

